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Tan Sri Dr Mohd Irwan Serigar bin Abdullah v Datuk Kamal bin Mohd Ali & Anor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS W-02(IM)(NCVC)-1572–09 OF 2024 AND W-02(IM)(NCVC)-1573–09 OF 2024
NANTHA BALAN, AZMI ARIFFIN JJCA AND AHMAD KAMAL HCJ
6 NOVEMBER 2024

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Civil Procedure — Third party proceedings — Contribution/indemnity from third party — Whether defendant's inordinate delay in filing third party proceedings was fatal — Whether good reason for the delay had been shown — Whether defendant's claim against third parties was not frivolous or abuse of process as third parties had filed their respective defences and had to answer to the claims made against them

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Malaysia's infamous sovereign wealth fund company, 1 Malaysia Development Berhad ('1MDB'), sued its former Group Executive Director cum Chief Executive Officer cum President ('Arul Kanda') and a former director and chairman of its board ('Irwan') in the High Court for breaching their contractual, statutory, fiduciary and common law duties to 1MDB by failing to act honestly, in good faith and in the best interests of the company during their respective terms of office, thereby causing 1MDB to suffer massive financial losses. It was specifically pleaded that Arul Kanda and Irwan had: (a) failed to inquire into, investigate and ascertain the status and background of several investments that 1MDB had made (which were subsequently found to be fraudulent) and failed to take steps to recover those investments; (b) failed to exercise reasonable care, skill and diligence to inquire into, investigate and ascertain wrongdoings by officers of 1MDB in relation to various dubious transactions that were entered into by the company and failed to take appropriate action against such wrongdoers; and (c) procured and/or caused 1MDB to enter into transactions with third parties that were contrary to 1MDB's interests. Three years after 1MDB commenced its suit, Irwan applied to add six individuals as third parties to the suit, among whom were 'Kamal', 'Norazman' and 'Azmi Tahir'. All six persons successfully applied to set aside the third party ('TP') notices issued against them. In the instant appeals, Irwan appealed against the setting aside of the TP notices against Kamal, Norazman and Azmi Tahir. As against Kamal and Norazman, Irwan sought contribution from them if he was found liable to 1MDB in the main suit, on the ground that they also sat on 1MDB's board during the time he was the board's chairman and hence they were equally involved in all discussions, decision-making and acts or omissions with respect to matters that formed the subject-matter of

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1MDB's claims against him. Irwan sought indemnity from Azmi Tahir on the ground that at all material times, Azmi Tahir was the Chief Financial Officer ('CFO') of 1MDB, signatory of the company's accounts, and responsible not only for ensuring that all payments made by the company were for legitimate purposes but also for keeping the 1MDB board updated with correct and accurate information about the company's various investments. It was alleged that despite knowing of concerns raised by 1MDB' s external auditors about the propriety of certain investments, Azmi Tahir never took any action to address those concerns and, instead of acting on the instructions of the board, he instead obeyed the instructions of persons in high office who used 1MDB as a vehicle to carry out their fraudulent designs for personal benefit. The High Court set aside the TP notices against Kamal, Norazman and Azmi Tahir, inter alia, on the ground that: (i) there was inordinate delay in the making of the third party application without good reason which amounted to an abuse of process as it delayed the trial of the main suit; and (ii) it was 1MDB's choice to decide which members of the board it wished to sue for breach of fiduciary, common law and statutory duties.

Held, unanimously allowing the appeals and setting aside the High Court's decision:

(1) There was no inordinate delay on Irwan's part in taking out the third party proceedings. At all material times, Irwan's solicitors were waiting for documents from 1MDB's solicitors who had initially given the impression that they would supply everything that was asked for by Irwan's solicitors but who later said they would not be giving the requested documents. Had they stated their position from the earliest onset, Irwan would have applied for discovery. Hence, the delay was, to a large part, contributed to by 1MDB's refusal to give all the documents asked for, but only doing so after the third party action was filed (see paras 19–20).

(2) The issue of delay had to be examined and considered in the context of the Supreme Court's decision in *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping Perak & Ors* [1989] 1 MLJ 226 where it was held that for purposes of commencement of the cause of action for indemnity or contribution, time only started to run when the defendant was found liable. As such, the defendant's right to sue the third party for indemnity or contribution could not be said to have been delayed. On that premise and analysis, this court did not agree with the High Court's view in the present case that there was inordinate delay in the filing of the third party proceedings (see paras 21 & 23).

(3) Looking at Irwan's comprehensive statement of claim against Kamal, Norazman and Azmi Tahir, it could not be said that the claim for contribution was frivolous or an abuse of process. The trio had in fact

filed their defences to the third party action and must answer for their respective roles and actions (or inactions) whilst they held office in 1MDB. It was not entirely correct to say that it was for 1MDB to choose whom it wished to sue. Whilst that was the company's prerogative, it was open to a defendant to bring in as third parties, all parties who in the defendant's view shared or bore responsibility for the impugned acts or omissions and who might be liable/answerable for the claim in the main suit (see paras 24 & 26).

[Bahasa Malaysia summary

Syarikat dana kekayaan berdaulat Malaysia yang terkemuka, 1 Malaysia Development Berhad ('1MDB'), menyaman bekas Pengarah Eksekutif Kumpulannya merangkap Ketua Pegawai Eksekutif merangkap Presiden ('Arul Kanda') dan bekas pengarah dan pengerusi lembaganya ('Irwan') di Mahkamah Tinggi kerana melanggar kewajipan kontrak, berkanun, fidusiari dan common law kepada 1MDB kerana gagal bertindak secara amanah, suci hati dan demi kepentingan syarikat sepanjang tempoh masing-masing, sekali gus menyebabkan 1MDB mengalami kerugian kewangan yang besar. Ia secara khusus memplidkan bahawa Arul Kanda dan Irwan telah: (a) gagal untuk menyoal, menyiasat dan memastikan status dan latar belakang beberapa pelaburan yang telah dibuat oleh 1MDB (yang kemudiannya didapati sebagai penipuan) dan gagal mengambil langkah untuk mendapatkan semula pelaburan tersebut; (b) gagal secara munasabah dan berjaga-jaga, berkebolehan dan tekun ketika untuk menyoal, menyiasat dan mengepasti salah laku oleh pegawai 1MDB berhubung dengan pelbagai urus niaga yang meragukan yang dilakukan oleh syarikat dan gagal mengambil tindakan sewajarnya terhadap pesalah tersebut; dan (c) memperoleh dan/atau memastikan 1MDB melakukan transaksi dengan pihak ketiga yang bertentangan dengan kepentingan 1MDB. Tiga tahun selepas 1MDB memulakan samannya, Irwan memohon menambah enam individu lain sebagai pihak ketiga dalam saman itu, antaranya adalah 'Kamal', 'Norazman' dan 'Azmi Tahir'. Kesemua enam orang berjaya memohon untuk mengetepikan notis pihak ketiga ('PK') yang dikeluarkan terhadap mereka. Dalam rayuan semasa, Irwan merayu terhadap pengetepian notis TP terhadap Kamal, Norazman dan Azmi Tahir. Sebagai balasan Kamal dan Norazman, Irwan memohon pelepasan daripada mereka jika dia didapati bertanggungjawab terhadap 1MDB dalam saman utama, atas alasan mereka juga menganggotai lembaga pengarah 1MDB semasa dia menjadi pengerusi lembaga itu dan oleh itu mereka terlibat sama dalam semua perbincangan, membuat keputusan dan tindakan atau peninggalan berkenaan dengan perkara yang membentuk tuntutan terhadapnya terhadap 1MDB. Irwan memohon ganti rugi daripada Azmi Tahir atas alasan bahawa pada setiap masa material, Azmi Tahir adalah Ketua Pegawai Kewangan ('KPK') 1MDB, penandatangan akaun syarikat, dan bertanggungjawab bukan sahaja untuk memastikan semua pembayaran yang dibuat oleh syarikat adalah untuk tujuan yang sah tetapi juga untuk memastikan lembaga 1MDB dikemas kini dengan

pelbagai maklumat pelaburan yang betul dan tepat mengenai syarikat itu. Ianya didakwa bahawa walaupun mengetahui kebimbangan yang dibangkitkan oleh juruaudit luar 1MDB tentang kewajaran pelaburan tertentu, Azmi Tahir tidak pernah mengambil sebarang tindakan untuk menangani kebimbangan tersebut dan, sebaliknya bertindak mengikut arahan lembaga pengarah, dia sebaliknya mematuhi arahan pegawai atasan yang menggunakan 1MDB sebagai wadah untuk melaksanakan bentuk penipuan mereka untuk kepentingan peribadi. Mahkamah Tinggi mengenepikan notis TP terhadap Kamal, Norazman dan Azmi Tahir, antara lain, atas alasan bahawa: (i) terdapat kelewatan yang melampau dalam membuat permohonan pihak ketiga tanpa sebab yang kukuh yang mengakibatkan penyalahgunaan proses kerana ia menangguhkan perbicaraan saman utama; dan (ii) ia adalah pilihan 1MDB untuk memutuskan ahli lembaga pengarah dan undang-undang yang mana yang dikehendakinya untuk disaman atas pelanggaran kewajiapan fidusiari, common law dan berkanun.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Tidak ada kelewatan yang melampau di pihak Irwan dalam mengemukakan prosiding pihak ketiga. Pada setiap masa material, peguamcara Irwan sedang menunggu dokumen daripada peguamcara 1MDB yang pada mulanya memberi gambaran bahawa mereka akan membekalkan semua yang diminta oleh peguamcara Irwan tetapi yang kemudiannya berkata mereka tidak akan memberikan dokumen yang diminta. Sekiranya mereka menyatakan pendirian mereka dari awal, Irwan akan memohon untuk penzahiran. Oleh itu, kelewatan itu, sebahagian besarnya, disumbangkan oleh keengganan 1MDB untuk memberikan semua dokumen yang diminta, tetapi hanya berbuat demikian selepas tindakan pihak ketiga difailkan (lihat perenggan 19–20).

(2) Isu kelewatan perlu diteliti dan dipertimbangkan dalam konteks keputusan Mahkamah Agung dalam *Mat Abu bin Man v Medical Superintendent, General Hospital Taiping* [1989] 1 MLJ 226 di mana ia telah diputuskan bahawa untuk tujuan permulaan kausa tindakan untuk ganti rugi atau sumbangan, masa hanya mula berjalan apabila defendan didapati bertanggungjawab. Oleh itu, hak defendan untuk menyaman pihak ketiga untuk ganti rugi atau sumbangan tidak boleh dikatakan telah ditangguhkan. Atas premis dan analisis itu, mahkamah ini tidak bersetuju dengan pandangan Mahkamah Tinggi dalam kes semasa bahawa terdapat kelewatan yang melampau dalam pemfailan prosiding pihak ketiga (lihat perenggan 21 & 23).

(3) Melihat kepada pernyataan tuntutan komprehensif Irwan terhadap Kamal, Norazman dan Azmi Tahir, ia tidak boleh dikatakan bahawa

tuntutan sumbangan adalah remeh atau penyalahgunaan proses. Ketiga-tiga mereka sebenarnya telah memfailkan pembelaan mereka kepada tindakan pihak ketiga dan mesti menjawab peranan dan tindakan masing-masing (atau tiada tindakan) semasa mereka memegang jawatan dalam 1MDB. Ia adalah tidak betul untuk mengatakan bahawa 1MDB harus memilih siapa yang ingin dituntutnya. Walaupun itu adalah hak prerogatif syarikat, ia terbuka kepada defendan untuk membawa masuk sebagai pihak ketiga, semua pihak yang pada pandangan defendan berkongsi atau memikul tanggungjawab untuk perbuatan atau peninggalan yang dipertikaikan dan yang mungkin bertanggungjawab/diwajibkan atas tuntutan dalam saman utama (lihat perenggan 24 & 26).]

Cases referred to

Datin Paduka Phang Oi Choo @ Phang Ai Tu v Tan Sri Datuk G Gnanalingam and other appeals [2017] 5 MLJ 800, CA (refd)

Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping Perak & Ors [1989] 1 MLJ 226; [1988] 1 MLRA 294; [1989] 1 CLJ Rep 98, SC (folld)

Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties) [2012] 9 MLJ 464; [2012] 2 MLRH 466, HC (refd)

Legislation referred to

Civil Law Act 1956 s 10(1)(c)
Public Authorities Protection Act 1948 s 2, 2(a)
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 16

Appeal from: *1Malaysia Development Bhd v Arul Kanda a/l Kandasamy & Anor* [2024] MLJU 824 (High Court, Kuala Lumpur)

Lavania Kumaraendran (with Mavin Thillainathan) (Lavania & Balan Chambers) in Civil Appeal Nos W-02(IM)(NCVC)-1572–09 of 2024 and W-02(IM)(NCVC)-1573–09 of 2024 for the appellant.

Razlan Hadri bin Zulkifli Edmund (with Choi Sing Eu) (Gan, Ho & Razlan Hadri) in Civil Appeal W-02(IM)(NCVC)-1572–09 of 2024 for the respondents.

Wan Aizuddin bin Wan Mohammed (with Rahmat bin Mohamed Hazlan) (Rahmat, Wan & Rahmat) in Civil Appeal W-02(IM)(NCVC)-1573–09 of 2024 for the respondent.

Nantha Balan JCA:

INTRODUCTION

[1] There are two appeals before us, namely, Civil Appeal No W-02(IM)(NCVC)-1572–09 of 2024 ('Appeal 1572') and Civil Appeal No W-02(IM)(NCVC)-1573–09 of 2024 ('Appeal 1573'). The appellant in both appeals is Tan Sri Dr Mohd Irwan Serigar bin Abdullah ('Irwan'). He is the second defendant in Kuala Lumpur High Court Suit No WA-22NCvC-338–05 of 2021 ('Suit 338'). The appeals are against the decision of the learned judicial commissioner (as he then was) dated 6 September 2024 in Suit 338. The plaintiff in Suit 338 is 1Malaysia Development Bhd or more infamously known as '1MDB'. The first defendant in Suit 338 is Arul Kanda a/l Kandasamy. We shall refer to the first defendant in Suit 388 as 'Arul Kanda' and the appellant in both appeals as 'Irwan'. Arul Kanda and Irwan shall be collectively referred to as 'the defendants'. The respondents in Appeal 1572 are Datuk Kamal bin Mohd Ali (third party 1) and Dato' Seri Norazman bin Ayob (third party 2). The respondent in Appeal 1573 is Azmi bin Tahir (third party 3). For ease of reference we shall refer to the respondents in both appeals by their abbreviated names, 'Kamal', 'Norazman' and 'Azmi' respectively. Where necessary, Kamal, Norazman and Azmi shall be referred to collectively as 'the third parties'.

[2] By the said decision dated 6 September 2024 the learned judicial commissioner had allowed the applications by the third parties (per encls 236 and 241) and set aside the third party notice dated 10 June 2024 (encl 167) and struck out Irwan's statement of claim against the third parties dated 2 August 2024 (encl 191). The application by Kamal and Norazman is encl 236 whereas the application by Azmi is encl 241.

[3] For completeness, we should mention that there are other third parties who succeeded in their applications to set aside the third party notice and strike out Irwan's Statement of Claim against them. The other third parties are Tan Sri Dato' Seri Lodin bin Wok Kamaruddin (third party 4), Datuk Seri Asri bin Hamidin @ Hamidon (third party 5) and Datuk Johan bin Mahmood @ Johan Mahmood Merican (third party 6). However, Irwan did not lodge any appeal against the judicial commissioner's decision vis a vis these other said third parties. As such, the present appeals are only concerned with the third party proceedings against Kamal, Norazman and Azmi and no reference will be made to Irwan's allegations against these other third parties or the judicial commissioner's decision vis a vis these other third parties.

[4] We should also mention that counsel who appeared before us informed the court that 1MDB, qua the plaintiff in Suit 338 did not object and took no

A position vis a vis Irwan's third party proceedings against the third parties, and the applications by Kamal, Norazman and Azmi. Thus, the dispute was purely between Irwan and the third parties. As such, 1MDB did not participate in the appeals before us.

B BACKGROUND

[5] 1MDB was incorporated on 27 February 2009 to, inter alia, undertake investments for the purpose of promoting the economic and social growth and development of Malaysia. According to 1MDB, since around 20 July 2016 C through the announcement of the filing by United States of America Department of Justice ('DOJ') of its civil forfeiture complaints for recovery of misappropriated 1MDB funds, it has become public knowledge that 1MDB, being Malaysia's wealth fund was in fact a self-enriching stealth fund for fugitive Jho Low, convicted former Prime Minister Dato' Seri Najib Razak, his D step son Riza Aziz, convicted Tarek Obaid and Patrick Mahony and other associate fraudsters, who received Malaysia's public funds.

[6] Arul Kanda, was appointed by 1MDB as its Group Executive Director and President, serving from 1 January 2015 to 31 December 2017. On E 31 December 2016, Arul Kanda resigned as a director of 1MDB but remained as President. Arul Kanda was primarily responsible for the management of 1MDB at the material time in his capacity as the Group Executive Director and the President of 1MDB. Pursuant to a purported employment extension agreement dated 23 February 2018 ('employment extension agreement'), Arul F Kanda's employment as 1MDB's President was extended for six months from 1 January 2018 to 30 June 2018. On 28 June 2018, 1MDB terminated Arul Kanda's employment on grounds of, inter alia, breach of contractual and fiduciary duties.

G **[7]** Irwan, who was Secretary General of Treasury from 2012 to 2018, was appointed a director of 1MDB and the Chairman of the Board, serving from 31 May 2016 to 23 May 2018. According to 1MDB, the trial in Suit 338 is to establish to what extent Arul Kanda and Irwan — bear responsibility and H liability for their actions and/or omissions in relation to their involvement in the affairs of 1MDB, from the time they were appointed in 2015 and 2016 respectively.

[8] It is 1MDB's pleaded case that Arul Kanda and Irwan owed contractual, I statutory, fiduciary and common law duties to 1MDB to, inter alia, act honestly and in good faith in the best interests of 1MDB. The breaches of duties that form part of the claim against both defendants is stated in the statement of claim, which are:

(a) failure to inquire, investigate and ascertain the status and background of

1MDB's various investments and to recover these investments, thereby causing 1MDB to suffer loss and damage;

(b) failure to exercise reasonable care, skill and diligence to inquire, investigate and/or ascertain whether there were any wrongdoings by officers of 1MDB in relation to the various transactions entered into by 1MDB;

(c) failure to exercise reasonable care, skill and diligence to take appropriate actions against the wrongdoers identified in the Public Accounts Committee ('PAC') report and DOJ complaint; and

(d) procuring and/or causing 1MDB to enter into various transactions with third parties in total disregard of 1MDB's interests.

[9] 1MDB claims that both Arul Kanda and Irwan knew or ought to have known that the various transactions entered into by 1MDB were a sham, questionable and/or detrimental to the interests of 1MDB. 1MDB claims that Irwan had conspired with Arul Kanda to execute the purported employment extension agreement with Arul Kanda and make substantial payments to Arul Kanda in total disregard of the interests of 1MDB. 1MDB also claims the said agreement was a sham, fraudulent, illegal or void ab initio. 1MDB's claim in Suit 338 against Arul Kanda and Irwan can be gleaned from the opening statement which was filed by 1MDB's counsel. The opening statement outlines the case against Arul Kanda and Irwan with remarkable clarity.

1MDB'S OPENING STATEMENT

[10] 1MDB's opening statement reads as follows:

1. The Plaintiff, 1Malaysia Development Berhad ('1MDB') was incorporated on 27 February 2009 to inter alia undertake investments for the purpose of promoting the economic and social growth and development of Malaysia. The world knew with legal basis since 20 July 2016 through the announcement of the filing by United States of America Department of Justice ('DOJ') of its Civil Forfeiture Complaints for recovery of misappropriated 1MDB funds, that 1MDB our sovereign wealth fund was in fact a self-enriching stealth fund for fugitive Jho Low, convicted former Prime Minister Dato' Seri Najib Razak, his step son Riza Aziz, convicted Tarek Obaid and Patrick Mahony and other associate fraudsters, who received Malaysia's public funds.

2. The 1st Defendant, Arul Kanda a/l Kandasamy ('Arul Kanda'), was appointed by 1MDB as its Group Executive Director and President, serving from 1 January 2015 to 31 December 2017. On 31 December 2016, Arul Kanda resigned as a director of 1MDB but remained as President. Arul Kanda was primarily responsible for the management of 1MDB at the material time in his capacity as the Group Executive Director and the President of 1MDB.

3. Pursuant to a purported Employment Extension Agreement dated 23 February

2018 ('Employment Extension Agreement'), Arul Kanda's employment as 1MDB's President was extended for six months from 1 January 2018 to 30 June 2018.

4. On 28 June 2018, 1MDB terminated Arul Kanda's employment on grounds of, inter alia, breach of contractual and fiduciary duties.

5. The 2nd Defendant, Tan Sri Dr Mohd Irwan Serigar bin Abdullah ('TS Irwan Serigar') who was Secretary General of Treasury from 2012 to 2018, was appointed a director of 1MDB and the Chairman of the Board, serving from 31 May 2016 to 23 May 2018.

6. Arul Kanda, admitted in his current Amended Defence and Counterclaim dated 21 March 2023 (which he is now belatedly seeking to amend), at:

6.1. Paragraph 5: '... whilst the objects of the Plaintiff may have been for the purposes of promoting the economic, social growth and development of Malaysia, based on the information now available in the public domain, the transactions that were entered into by the Plaintiff from 2009 to 2014 were designed to defraud the Plaintiff, and consequently the citizens of Malaysia'. [emphasis added].

6.2. Paragraph 7: '... the shareholder as well as the directors and various members of the senior management of the Plaintiff [1MDB] had grounds to suspect that the transactions entered into by the Plaintiff from 2009 to 2014 were fraudulent in nature and/or in breach of the objectives of the Plaintiff'.

6.3. Paragraph 11: '... but for the fraudulent conduct, negligence and/or the failure of the senior management, professional advisers, former board of directors, various agencies of the Federal Government in carrying out its duties and its statutory responsibilities in determining the legitimacy and/or viability of the transactions entered into by the Plaintiff between 2009 to 2014, the losses now being claimed by the Plaintiff would not have taken place'.

6.4. Paragraph 62(c): 'That the complaint filed by the United States Department of Justice ('DOJ') in July 2016 and June 2017 exposes the extent of the fraud involving the Plaintiff including the role of the former Prime Minister of Malaysia and his family in the said fraud'.

B. 1MDB'S CAUSES OF ACTION

7. This trial is to establish to what extent two individuals — Arul Kanda and TS Irwan Serigar — bear responsibility and liability for their actions and/or omissions in relation to their involvement in the affairs of 1MDB, from the time they were appointed in 2015 and 2016 respectively.

8. It is 1MDB's pleaded case that Arul Kanda and TS Irwan Serigar owed contractual, statutory, fiduciary and common law duties to 1MDB to inter alia act honestly and in good faith in the best interests of 1MDB.

9. The breaches of duties that form part of the Plaintiff's claim against both Defendants is stated in the Statement of Claim, which are:

9.1. Failure to inquire, investigate and ascertain the status and background of 1MDB's various investments and to recover these investments, thereby causing 1MDB to suffer loss and damage;

9.2. Failure to exercise reasonable care, skill and diligence to inquire, investigate and/or ascertain whether there were any wrongdoings by officers of 1MDB in relation to the various transactions entered into by 1MDB;

9.3. Failure to exercise reasonable care, skill and diligence to take appropriate actions against the wrongdoers identified in the Public Accounts Committee ('PAC') Report and DOJ Complaint;

9.4. Procuring and/or causing 1MDB to enter into various transactions with third parties in total disregard of 1MDB's interests.

10. As stated in Paragraph 15.2 of the Statement of Claim, 1MDB claims that both Arul Kanda and TS Irwan Serigar knew or ought to have known that the various transactions entered into by 1MDB were a sham, questionable and/or detrimental to the interests of 1MDB.

11. Further, as stated in paragraph 15.3 to 15.5 of the Statement of Claim, 1MDB claims that TS Irwan Serigar had conspired with Arul Kanda to execute the purported Employment Extension Agreement with Arul Kanda and make substantial payments to Arul Kanda in total disregard of the interests of 1MDB. 1MDB also claims the said Agreement was a sham, fraudulent, illegal or void ab initio.

C. THE EVIDENCE OF 1MDB

12. 1MDB will lead evidence through three (3) witnesses:

(a) PW-1 Richard Templeman;

(b) PW-2 Tony Pua Kim Wee; and

(c) PW-3 Witness from MOF/1MDB.

13. PW-1 is a director of investigations at Kroll Advisory Ltd, an international advisory firm with specialist expertise in inter alia restructuring and insolvency, forensic accounting and investigations and cross-border asset recovery. He has been subpoenaed by the Plaintiff and requested to give evidence and produce the relevant documents relating to the money trail of 1MDB's misappropriated funds through various intermediaries.

14. PW-1 will adduce evidence of the flow of funds, specifically those funds which were misappropriated from 1MDB in the 'Good Star' Phase, the 'Aabar' Phase and the 'Options Buyback' Phase of the fraud.

15. The evidence of PW-1 will show that there were wrongdoings (and consequently, liability) stemming and flowing from the transactions involving 1MDB from 2009 to 2014, and thereafter. This would form the underlying facts and background to 1MDB's claim against Arul Kanda and TS Irwan Serigar.

16. The claims against various persons and entities for the wrongdoings as mentioned above are pending in several legal proceedings in other Courts.

17. PW-2 was a Member of Parliament from 2008 to 2022. He was a member of the PAC from 2008 to 2018, during which time there were examinations carried out by the PAC in relation to the affairs of 1MDB. He also assisted the Minister of Finance

on matters relating to 1MDB from 2018 to 2022.

18. The Court will hear testimony from PW-2 of the various events and incidents (based on documents available to 1MDB and public domain in the words of Arul Kanda) that occurred in 2015 onwards, which ought to have given rise to a clear duty on the part of both Arul Kanda and TS Irwan Serigar to inquire, investigate and ascertain the status and background of 1MDB's various investments and whether there were any wrongdoings by officers of 1MDB in relation thereto.

19. This will be broken down into the following phases:

19.1. The Brazen Sky Investments

(a) On or about 12 September 2012, Brazen Sky, a wholly owned subsidiary of 1MDB which was incorporated in the British Virgin Islands purportedly invested USD2.318 billion in the Bridge Global Absolute Return Fund SPC, a segregated portfolio company registered in the Cayman Islands Bridge Global Fund'). BSI Bank in Singapore ('BSI Singapore') was the custodian of the Bridge Global Fund and Bridge Partners Investment Management (Cayman) Limited was the fund manager.

(b) The purported investment in the Bridge Global Fund originated from a sum of approximately USD1.83 billion invested by 1MDB in 1MDB-PetroSaudi Ltd, a joint-venture between 1MDB and PetroSaudi Holdings (Cayman) Limited.

19.2. IPIC/Aabar PJS

(a) Between May 2012 and October 2014, 1MDB and/or its subsidiaries entered into various agreements with IPIC and its wholly-owned subsidiary, Aabar PJS in connection with acquisition of power assets by 1MDB's subsidiaries. During this period, 1MDB and/or its subsidiaries made total payment of approximately USD3.5 billion ('USD3.5 billion Payment') to Aabar Investment PJS Limited in the British Virgin Islands ('Aabar BVI') and Aabar Investment PJS Limited in Seychelles ('Aabar Seychelles').

(b) These payments to Aabar BVI and to Aabar Seychelles were later discovered to be wrongful. IPIC and Aabar PJS confirmed that these entities were not within either the IPIC or Aabar PJS group and neither IPIC nor Aabar PJS has received any payments from those entities or assumed any liabilities on their behalf.

(c) On 28 May 2015, 1MDB, MOF Inc., IPIC and Aabar PJS entered into a binding term sheet ('the Binding Term Sheet') setting forth the terms for the settlement on an overall basis and thereafter release and discharge of all outstanding obligations and liabilities which any of 1MDB and/or its subsidiaries ('1MDB Group'), or any of IPIC and/or its subsidiaries ('IPIC Group') (which includes Aabar and/or its subsidiaries ('Aabar Group') may owe to one another.

(d) On 13 June 2016, IPIC and Aabar PJ commenced arbitration against 1MDB and MOF to claim for the sums due under the Binding Term Sheet.

(e) 1MDB and MOF executed a Settlement Deed and Supplemental Deed with IPIC and Aabar PJS on 22 April 2017.

(f) Despite the terms and conditions of the proposed settlement being onerous to 1MDB and concerns were raised by the Board thereto and despite 1MDB being advised that it has a strong case against IPIC and Aabar PJS for the credit of the USD3.5 billion, Arul Kanda and TS Irwan Serigar, in breach of their duties owed to 1MDB and in total disregard of 1MDB's interest, continued to recommend and caused the Board to authorise execution of the Settlement Deed and Supplemental Deed and/or entering into the Consent Award dated 9 May 2017.

C.1 BRAZEN SKY

20. For the Brazen Sky investment, the Plaintiff will lead evidence through PW-2 to show that Arul Kanda made inaccurate representations to the Board of Directors of 1MDB and inaccurate public statements on behalf of 1MDB regarding the status of the investment:

20.1. In a Board meeting held on 12 January 2015, Arul Kanda reported that the balance of the Brazen Sky investment in Bridge Global Fund amounting to USD939,874,085 had been redeemed and was held as cash since 31 December 2014;

20.2. In a media statement released on 13 January 2015, Arul Kanda stated that 1MDB had redeemed in full the Brazen Sky investment;

20.3. In an article published in the Business Times Singapore, Arul Kanda is quoted as saying 'The cash is in our accounts and in US Dollars. I can assure you (about that) ... I have seen the statements';

20.4. Later, Arul Kanda clarified to the Board on 24 March 2015 that the monies were still within the fund structure and was not in cash. But he did not clarify this to the public;

20.5. On 16 June 2015, a media statement was issued in response to Tun Dr Mahathir's blog statements, in which Arul Kanda appears to backtrack and state that he had never seen the cash and he had referred only to statements showing fund unit ownership;

20.6. It was only on 10 October 2015, a media statement was issued (in response to Sarawak Report allegations) to state that Arul Kanda had earlier made a mistake on 12 January 2015 and that his statement that the Brazen Sky investment had been redeemed in full was not accurate.

21. These five statements by Arul Kanda gave the impression that there was an actual investment made by Brazen Sky in the Bridge Global Fund, when in reality, if he had investigated the status of the said investment, Arul Kanda would have discovered that it was part of a fraudulent scheme to deceive 1MDB.

22. Evidence will also be led to show that there were several red flags or incidents relating to Brazen Sky that occurred from 2015 onwards, which ought to have given rise to a clear duty on the part of both Arul Kanda and TS Irwan Serigar to inquire, investigate and ascertain the status and background of 1MDB's various investments and whether there were any wrongdoings by officers of 1MDB in relation thereto:

22.1. 1st Red Flag: Concerns raised by the auditors, Deloitte in 2015. The evidence will show that throughout 2015 Deloitte raised serious concerns about the reliability of representations made by the management of 1MDB in particular on the status of the Brazen Sky investment. Deloitte repeatedly requested for documents and meetings to independently verify the status of the investment, thereby highlighting their concerns about the nature of the Brazen Sky investment. Deloitte resigned as auditors on 26 February 2016.

22.2. 2nd Red Flag: Issues raised and Shortcomings highlighted in the PAC Report dated 7.4.2016. The PAC Report contains detailed and comprehensive account of the issues and problems relating to the transactions and dealings entered into by 1MDB, including the investment in PetroSaudi International Ltd (formerly known as 1MDB PetroSaudi Limited) by way of a joint venture between 1MDB and PetroSaudi Holdings (Cayman) Limited and the status of the investment in the form of Brazen Sky Limited's ownership of fund units in the Bridge Global Fund. The PAC Report also highlighted all the corresponding failures of management to comply with Board instructions.

22.3. 3rd Red Flag: Actions taken against BSI Singapore by the Monetary Authority of Singapore (MAS) and the Swiss Financial Market Supervisory Authority (FINMA) in April / May 2016. Both these regulatory bodies took enforcement action against BSI Bank, the custodian bank of the funds belonging to Brazen Sky. Both released statements detailing the actions taken against several individuals in BSI Bank relating to their serious breaches of anti-money laundering regulations. The FINMA media release mentioned 1MDB specifically.

22.4. 4th Red Flag: The United States of America Department of Justice (DOJ) Civil Forfeiture Action in June 2017. The DOJ action highlighted that over the course of an approximately 5 years period, multiple individuals including public officials and their associates conspired to fraudulently divert billions of dollars from 1MDB through various means, including by defrauding foreign banks and by sending foreign wire communications in furtherance of the scheme and thereafter launder the proceeds of that criminal conduct including in and through US financial institutions. The Good Star Phase and the Options Buyback Phase which directly relate to the Brazen Sky investment are explained in detail in the DOJ action.

23. Each of these events taken separately should have given rise to serious concerns about the economic substance of the Brazen Sky investment, and ought to have resulted in inquiries and investigations by any reasonable person in the position of Arul Kanda and/or TS Irwan Serigar to ascertain the background and true status of the said investment. If this had been initiated or undertaken at that material time, they would have discovered the fraud that had been perpetrated against 1MDB and would have been under an obligation to take the appropriate action to initiate

recovery and hold accountable the person or persons who were involved in the transactions.

24. But this was never done. Instead, as we will show in the evidence during the proceedings, Arul Kanda took it upon himself to present the 1MDB transactions as being beneficial for the country and a success. He publicly stated that all questions and criticisms of the 1MDB transactions were politically motivated and half-truths.

C.2 IPIC/AABAR PJS

25. Arul Kanda does not deny he discovered or was informed on 8 April 2016 by the managing directors of IPIC and Aabar PJS that Aabar BVI and Aabar Seychelles were not part of IPIC or Aabar PJS and consequently they denied payments made by 1MDB in the amount of USD3.5 billion to Aabar BVI and Aabar Seychelles were received by them, at that point in time.

26. IPIC made an announcement to that effect on 11 April 2016 to the London Stock Exchange.

27. The evidence will show that from that time onwards there did not seem to be any real or tangible urgency on the part of Arul Kanda and TS Irwan Serigar to immediately investigate the circumstances surrounding this monumental revelation or discovery, or to ascertain how such payments were made and by whom within 1MDB. No action appears to be taken against any of the persons involved in approving and effecting this transaction.

28. Evidence will also be led on the circumstances leading to the dispute between 1MDB and IPIC/Aabar PJS being the subject of arbitration proceedings and subsequently the execution of a settlement between the parties on terms unfavourable to 1MDB.

29. It is 1MDB's position that any Board member in order to determine whether the settlement was in the best interests of the company must determine the full facts. The evidence will show that in this instance neither Arul Kanda nor TS Irwan Serigar investigated the full extent of the fund flow of the USD3.5 billion paid to Aabar BVI and Aabar Seychelles. Had they investigated, they would have found that USD3.5 billion were not paid lawfully for its ostensible purpose as will be shown in the evidence of Richard Templeman. Suits could have then been launched on that basis.

30. It is 1MDB's position that instead of merely taking instructions from Najib Razak to proceed to execute the Settlement Deed and the Supplemental Deed, both Arul Kanda and TS Irwan Serigar owed fiduciary duties to consider whether such instructions were in the best interests of 1MDB.

31. Despite the terms and conditions of the proposed settlement being onerous to 1MDB and concerns raised by the Board thereto and despite 1MDB being advised that it has a strong case against IPIC and Aabar PJS for the credit of the USD3.5 billion, Arul Kanda and TS Irwan Serigar, in breach of their duties owed to 1MDB and in total disregard of 1MDB's interest, continued to recommend and caused the Board to authorise execution of the Settlement Deed and Supplemental Deed.

C.3 EMPLOYMENT EXTENSION AGREEMENT

32. It is 1MDB's case that the purported Employment Extension Agreement dated 23 February 2018 was a sham, fraudulent and illegal. The evidence will show that the real purpose and objectives of the said Employment Extension Agreement were to ensure Arul Kanda did not disclose any fraud or wrongdoings in the management of 1MDB to the general public ahead of the 14th Malaysia General Elections in May 2018 and to give the impression that 1MDB's so-called rationalisation plan was ongoing.

33. 1MDB will lead evidence to show that instead of being on garden leave for the period 1 January 2018 onwards for a period of six months, Arul Kanda in the weeks and months leading up to the 14th Malaysia General Elections in May 2018 continued to make public statements and organise roadshows throughout Malaysia giving the impression that the transactions involving 1MDB were beneficial to the Government of Malaysia and the Malaysian public.

34. It is 1MDB's position that, in procuring or causing 1MDB to enter into the Employment Extension Agreement, TS Irwan Serigar had breached his duties to 1MDB. Arul Kanda and TS Irwan Serigar conspired with the intent to injure 1MDB or cause loss to 1MDB by unlawful means or to defraud 1MDB and conceal such fraud.

D. THE RELIEF SOUGHT BY 1MDB

35. What the Plaintiff will seek at the conclusion of the trial of this action is a clear finding that, on the totality of the evidence before this Honourable Court, both Arul Kanda and TS Irwan Serigar have on a balance of probabilities breached their respective duties owed to the Plaintiff.

36. For the reasons outlined above, this Honourable Court is invited at the end of trial to allow all the claims in this action and grant the final relief sought in the Statement of Claim.

IRWAN'S STATEMENT OF CLAIM AGAINST THE THIRD PARTIES

[11] Irwan filed his amended defence on 28 March 2023. On 30 May 2023, Irwan filed an application for leave to issue a third parties notice and leave was granted on 10 June 2024. On 2 August 2024, Irwan filed his statement of claim against the third parties. In his statement of claim Irwan is described as 'the second defendant'. On 29 August 2024, the third parties filed their defence to Irwan's third party proceedings.

[12] Irwan's statement of claim against the third parties (with emphasis added) is as follows:

3. The Plaintiff ('1MDB') was established to inter alia undertake investments for the purpose of promoting the economic and social growth and development of Malaysia. 1MDB is a strategic investment and development company wholly owned by the Government of Malaysia through the Minister of Finance (Incorporated) ('MOF Inc').

4. The 1st Defendant was the Group Executive Director, Chief Executive Officer and/or President of 1MDB from January 2015 till June 2018.

5. The 2nd Defendant was appointed Chairman of the Board of 1MDB on 31.5.2016 till 23.5.2018.

6. 1MDB's pleaded case against the 2nd Defendant, as stated in its Amended Statement of Claim dated 18.11.2021 ('SOC'), is for alleged breach of his contractual, statutory, fiduciary and/or common law duties owed to 1MDB, fraudulent breach of trust and/or conspiracy between the 1st and 2nd Defendants. Briefly, 1MDB alleges that the 2nd Defendant had:

6.1. Failed to act in the best interest of 1MDB by relying and accepting the representations of Azmi Tahir and Terence Geh in relation to the 2 status of the purported investment made by 1MDB's subsidiary, Brazen Sky Limited on or about 12.9.2012 in Bridge Global Absolute Return Fund SPC ('Brazen Sky Investment');

6.2. Failed to exercise reasonable care, skill and diligence to investigate whether there were any wrongdoings by officers of 1MDB and to take appropriate actions against them despite the finding of the PAC Report;

6.3. Failed to keep a proper accounting and implement a system of internal control to explain and audit the Brazen Sky Investment despite Deloitte's enquiries and clarifications regarding the status of the said investment;

6.4. Dishonestly, intentionally and/or recklessly failed to take appropriate steps to investigate the matters raised in the United States Department of Justice ('DOJ') complaint and accordingly take appropriate actions against the wrongdoers despite the allegations of criminal conduct and findings disclosed in the DOJ complaint with respect to the payment of USD3.5 billion to Aabar BVI ('USD3.5 billion Payment');

6.5. Dishonestly, recklessly and intentionally caused 1MDB to enter into a settlement of the Arbitration between 1MDB, International Petroleum Investment Company ('IPIC') and Aabar Investment PJS and recording a Consent Order dated 9.5.2017 ('Consent Award') to make payment of USD1,265,130,662.33 to IPIC ('Consent Award Payment');

6.6. Conspired with the 1st Defendant and caused 1MDB to execute the Employment Extension Agreement, wherein the 1st Defendant was paid RM2,905,200.00 to the detriment of 1MDB ('Employment Extension Agreement').

[hereinafter collectively referred to as the 'Impugned Transactions']

7. 1MDB seeks inter alia the following relief against the 2nd Defendant:

7.1. A declaration that the 2nd Defendant is liable to account as constructive trustee and an order for the 2nd Defendant to pay 1MDB the following:

7.1.1. USD1.83 billion being 1MDB's investment in Brazen Sky Investment;

7.1.2. USD3.5 billion being monies purportedly misappropriated from 1MDB to Aabar BVI and Aabar Seychelles;

7.1.3. USD1,265,130,662.33 being the sum paid to IPIC pursuant to the Consent Award;

7.1.4. RM2,905,200.0 being the sum paid by 1MDB to 1st Defendant under the Employment Extension Agreement.

7.2. Compensation in equity for purported breaches of duties and/or breach of trust;

7.3. General damages for purported breaches of contractual, statutory, fiduciary and/or common law duties owed by the 2nd Defendant to 1MDB; and

7.4. Damages for conspiracy to injure 1MDB in respect of payments made by 1MDB to 1st Defendant under the Employment Extension Agreement.

8. The 2nd Defendant disputes liability on 1MDB's claim, as set out in the 2nd Defendant's Amended Defence and Counterclaim dated 28.3.2023 ('D2 D&CC').

9. *In the event the 2nd Defendant is found liable in respect of 1MDB's claim then for the reasons elaborated below, the 2nd Defendant is entitled to claim contribution and/or indemnity from the third parties in respect of the loss and damage claimed by 1MDB, together with the costs of defending this action and prosecuting these third party proceedings*.

10. For ease of reference, the 2nd Defendant shall adopt the abbreviations in D2's D&CC for purposes of the third party Statement of Claim.

11. The successor to the Previous Board of Directors of 1MDB circa May 2016, inter alia, includes the following:

11.1. Irwan appointed as the Chairman and/or Director of 1MDB from 31.5.2016 to 23.5.2018;

11.2. Datuk Kamal Bin Mohd Ali ('Datuk Kamal'), the 1st third party, appointed as Director of 1MDB from 31.5.2016 to 19.2.2020; and

11.3. Dato' Norazman Bin Ayob ('Dato Sri Norazman'), the 2nd third party, appointed as Director of 1MDB from 31.5.2016 to 9.1.2023.

[13] The allegations by Irwan against Kamal, Norazman and Azmi are as follows:

D.2. Datuk Kamal

23. The 1st third party, Datuk Kamal served alongside Irwan as a Board member of 1MDB. He held this position throughout the period in which Irwan was Chairman of the Board. His tenure as a director at 1MDB was from 31.5.2016 to 19.2.2020.

24. As a fellow board member of Irwan at the material time, Datuk Kamal was involved in all discussions, deliberations and decisions and/or the alleged failure to discuss, deliberate and decide on matters forming the subject matter of 1MDB's claim against Irwan.

D.2. Dato Sri Norazman

25. The 2nd third party, Dato Sri Norazman served alongside Irwan as a Board member of 1MDB. He held this position throughout the period in which Irwan was Chairman of the Board. His tenure as a director at 1MDB was from 31.5.2016 to 19.2.2020.

26. As a fellow board member of Irwan at the material time, Dato Sri Norazman was involved in all discussions, deliberations and decisions and/or the alleged failure to discuss, deliberate and decide on matters forming the subject matter of 1MDB's claim against Irwan.

D.3. Azmi Tahir

27. The 3rd third party, Azmi Tahir was the Chief Financial Officer ('CFO') for 1MDB. To the best of Irwan's knowledge, Azmi Tahir's tenure as the CFO of 1MDB and other positions held in 1MDB, were as follows:

Dates	Position
1.6.2012–31.12.2017	Chief Financial Officer of 1MDB
20.09.2012–27.09.2018	Director of 1MDB Energy Holdings Limited ('1MEHL')
29.03.2013–27.09.2018	Director of 1MDB Energy Limited ('1MEL')
13.08.2012–27.09.2018	Director of 1MDB Energy (Langat) Limited '(1MELL')
09.11.2012–12.12.2014	Director of 1MDB Energy (Langat) Sdn Bhd ('1MELSB')
08.03.2013–08.08.2018	Director of 1MDB Global Investments Limited ('1MGIL')
07.08.2012–18.09.2018	Director of Brazen Sky Limited

28. Azmi Tahir was also a member of the Budiman Committee and Team Negaraku.

...

...

34. The *Third Parties and/or Senior Management of 1MDB owed their statutory duties, common law duties and fiduciary duties alongside their express and implied contractual duties to 1MDB* including, inter alia:

34.1. to act bona fide in good faith and fidelity in discharge of all their duties, powers, responsibilities and obligations;

34.2. to act in the best interests of 1MDB;

34.3. to perform their duties with reasonable care, competence and skills;

34.4. to act for the proper purpose of 1MDB in relation to its affairs;

34.5. to serve 1MDB dutifully and faithfully and not to advance or promote their own or external interests to the prejudice of or contrary to or in conflict with 1MDB's interest;

34.6. to take reasonable care of the assets and properties of the company;

34.7. to report and disclose all matters to the Board of 1MDB accurately and responsibly with all the necessary and relevant information that is accurate and updated;

34.8. to ensure that every transaction and contract entered into is done in the best interest of the Board and at arm's length in fulfillment of the objective of 1MDB and not to promote, advance and maximise individual profits and gain.

35. *In addition to the third parties' said fiduciary duties to 1MDB, the third parties owed duties at common law and equity including the duty to act honestly and use reasonable diligence in the discharge of the duties of their office as directors and/or Senior Management of 1MDB.*

36. *Irwan asserts that by virtue of the third parties' position as former and/or current Board Members and/or Senior Management of 1MDB, the third parties are jointly responsible for all decisions made in 1MDB and/or were fully aware and/or ought to be aware of the allegations contained in 1MDB's Statement of Claim including the Brazen Sky Investment, the USD3.5 billion Payment, Consent Award Payment, the Consent Award entered into and in causing 1MDB to enter into the Employment Extension Agreement.*

...

56. Irwan asserts that the third parties as Board Members and/or Senior Management of 1MDB at all material times were aware and/or ought to have been aware of and/or had participated in the activities, issues and decisions that were made and carried out by the Board. In summary, the broad claims can be summarised as follows:

56.1. The said decisions made were made jointly and collectively for and on behalf of 1MDB and therefore the third parties are equally responsible for the said decisions made by all the members of the Board of 1MDB.

56.2. Similarly, any such omission to take any action against the alleged wrongdoers were decisions collectively made by all members of the Board at the material time for reasons best known to them and in the interest of 1MDB and/or based on information so informed to the Board members at the material by the third parties.

56.3. The third parties by virtue of their respective positions and involvement and participation in such affairs and dealings undertaken by 1MDB were in possession of facts, information, documents and evidence and accordingly represented facts to the board members at the material time knowing that the board members would rely on the same in making the ultimate decision.

56.4. The third parties deliberately and willingly concealed and/or suppressed relevant, important and material information and evidence from the Board so as to mislead and/or disallow the Board at the material time to make informed, correct and appropriate decisions.

56.5. The third parties were aware and/or ought to have been aware that the due process and procedures were complied with and the necessary sanctions and

approvals were obtained from MOF and/or the sole shareholder of 1MDB, MOF Inc before certain decisions were made collectively by the Board of 1MDB, in particular the decision to settle the IPIC Arbitration which consequentially required 1MDB to make the Consent Award Payments and the agreement to enter into the Employment Extension Agreement and make the relevant payment to the 1st Defendant.

56.6. The third parties, in particular the 5th and 6th third parties were aware and/or ought to be aware that the primary reason Irwan was appointed as Chairman of 1MDB in May 2016 was to undertake and oversee the implementation of the rationalisation plan which included, but was not limited to, the restructuring the 1MDB group of companies and raising revenue and inviting investors to settle 1MDB's then existing debts and servicing future debt repayments.

56.7. Despite knowing that the actual wrongdoers were the previous board members and members of Senior Management, the third parties, in particular the 5th and 6th third party initiated and maintained a claim against the 2nd Defendant. It is contended that they did so in bad faith.

57. Irwan asserts that if this Honourable Court were to find the 2nd Defendant liable for any of the breaches of duty alleged by 1MDB and so decides to make a determination which is to make restitution to 1MDB, the same liability would *partier* attach to the third parties for their involvement.

58. Irwan will address the third parties involvement in the alleged breaches and/or omissions in accordance with the claim pleaded against Irwan, as briefly summarised above.

[14] In so far as Kamal and Norazman are concerned, Irwan made the following specific allegations in his statement of claim:

I. INVOLVEMENT OF DATO KAMAL AND DATO SRI NORAZMAN

85. Without derogation to 2nd Defendant's Defence and Counterclaim and in the event the 2nd Defendant is found liable to the Plaintiff, whether in the sum claimed or any part thereof, or interest or costs howsoever arising, the 2nd Defendant claims for contribution from Dato Kamal and Dato Sri Norazman as the 1st and 2nd Third Parties in this action in respect of any damages he may be held liable to pay aforesaid and in respect of his own cost in defending the action and the costs of third party proceedings, upon the grounds hereinafter pleaded.

86. Dato Kamal and Dato Sri Norazman served as Board members of 1MDB together alongside the 2nd Defendant throughout the latter's tenure as Chairman of 1MDB.

87. As Board members and Directors of 1MDB, Dato Kamal and Dato Sri Norazman share equal responsibility for the conduct, decisions and/or omissions attributed to the 2nd Defendant. They owed the same fiduciary, common law and/or statutory duties to 1MDB similar to that as the 2nd Defendant by virtue of them being Board Members of 1MDB.

88. Similar to the reasons why 2nd Defendant was appointed onto the Board of 1MDB in May 2016, the appointment of Dato Kamal and Dato Sri Norazman was to reflect 1MDB's new direction as a non-operating company, focusing on completing the rationalisation plan and on servicing future debt repayments. The objective of the board members were amongst others to:-

88.1. To oversee the implementation of the rationalisation plan which included, but were not limited to, the following:

88.1.1. Restructuring the 1MDB group of companies by, inter alia, closing down dormant companies within the group;

88.1.2. Appointing an auditor for 1MDB as the Companies Commission of Malaysia had at the material time issued a warning letter in respect of 1MDB's failure to lodge their audited accounts; and

88.1.3. Raising revenue and inviting investors to settle 1MDB's then existing debts amounting to approximately RM42 billion and servicing future debt repayments.

89. The 2nd Defendant contends that the events surrounding the Brazen Sky Investment occurred between 2009 and 2012, more than 3 years prior to the appointment of the 2nd Defendant, Dato Kamal and Dato Sri Norazman. As such just like the 2nd Defendant, they do not have prior personal knowledge of the decisions and/or conduct and/or direction taken by the Previous Board Members and/or Senior Management regarding the Brazen Sky Investment and the redemption of the proceeds thereof.

90. At all material times, the Board members at the material time were provided updates by Azmi Tahir on matters relating to the redemption of investment portfolio held by Brazen Sky Limited, the status of the USD3.5 billion Payment and/or regular financial updates to the Board.

91. At all material times, all information concerning Brazen Sky Investment and the redemption proceeds which culminated in compliance with the terms of the Binding Sheet entered between 1MDB, MOF, IPIC and Aabar PJS and compliance with the payments, were duly provided, informed and/or presented to the 2nd Defendant, Dato Kamal and Dato Sri Norazman during the Board meetings. In that regard:

91.1. The status and update on the Brazen Sky Investment was at most times part of the agenda to the board meetings wherein the updates were requested by the 2nd Defendant, Dato Kamal, Dato Sri Norazman;

91.2. It is reasonable for the Board members to rely on information and representations by Azmi Tahir as the CFO of 1MDB and whom was involved in all transactions, investments of 1MDB since he was appointed in 2012;

91.3. In fact, the Board members at the material time approved, authorised and directed Azmi Tahir to take all requisite steps to liquidate all funds whenever possible and expeditiously in order to realise the cash value for the purpose of the settlement and discharge liabilities relating to the Company's USDbond obligations.

92. Further, it was within the knowledge of the Board members that the Senior Management of 1MDB and the previous board directors amongst others, Mohd Hazem (previous COO, CEO and director) and Datuk Shahrol (former 1MDB CEOs), Jasmine Loo (former 1MDB counsel), Tan Sri Ismee (former non-executive director), and Tan Sri Mohd Bakke Salleh and Tan Sri Lodin (former chairman), Azmi Tahir (CFO) were at the material time in 2016 under investigations by several authorities, including by not limited to MACC and PDRM.

92.1. Further, criminal proceedings were also ongoing at that material time through the DOJ Complaint.

92.2. Sometime in April 2016, the Public Prosecutor in Singapore filed charges against former employee of BSI Bank for cheating and money laundering related to series of transactions involving Brazen Sky Investment.

92.3. In or around May 2016, the Monetary Authority of Singapore directed BSI Singapore to shut down due to serious breaches of anti-money laundering legislation and poor management oversight of operations. In or around the same time, the Swiss Financial Market Supervisory Authority issued a press statement after conducting investigation on BSI for breaches of money laundering regulations including transactions in relation to Brazen Sky Investment where BSI was the custodian of the Bridge Global Fund.

92.4. Subsequently, DOJ had instituted a civil forfeiture action in or about June 2017.

93. In that regard, the Board at the material time were comforted by the fact that necessary and sufficient steps have been undertaken by independent authorities to investigate the wrongdoers to determine the extent of the shortcomings, discrepancies and/or inaccuracies in the affairs of 1MDB. As such, the Board at the material time decided that they must concentrate on the primary reasons they were appointed, namely to focus on completing the rationalisation plan and on servicing future debt repayments of 1MDB.

94. As such and in any event, *if there is a finding that the 2nd Defendant at the material time breached his duties as alleged by 1MDB at paragraphs 50 of the SOC, then Dato Kamal and Dato Sri Norazman as the fellow directors of 1MDB sitting on the Board at the same period of time and tenure of the 2nd Defendant ought to be held equally liable for any damages should such determination of liability be held against the 2nd Defendant as pleaded at paragraphs 101.2, 101.3, 101.4, 101.5, 101.6, and 101.7 of the SOC*.

95. Further, *similar to the Brazen Sky transaction, the USD3.5 billion Payment was carried out between 2012 and 2014, 2 years prior before the 2nd Defendant, Dato Kamal and Dato Sri Norazman became members of the Board*. This is underscored by the absence of any allegations against the 2nd Defendant in the SOC (paragraphs 21 to 48 and 52 to 74). Instead, *1MDB's plea in that regard refers to allegations of wrongdoing by the 1st Defendant*, Datuk Shahrol, Hazeem Abdul Rahman, *Azmi Tahir* and Terence Geh.

96. *On 16.6.2016, during the Board meeting, the 2nd Defendant, Dato Kamal, Dato Sri Norazman were briefed by 1MDB's management, Azmi Tahir*, of the payment

made to Aabar BVI and that the London Arbitration was commenced by IPIC due to 1MDB's default MDB as they were unable to transfer any assets to IPIC by 31.12.2015.

> 96.1. It was the *collective decision of the Board to pursue any impending arbitration and defend 1MDB's position pertaining to the USD3.5 billion Payment. In that regard, the Board of directors at the material time sanctioned the Counterclaim within the arbitration to seek for repayment of USD3.5 billion*.

97. Notwithstanding, sometime in or around September 2016, it was informed to the Board, that discussions were held at Government-to-Government level to explore amicable settlement as an alternative to arbitration. Subsequently, on 28.12.2016, 1MDB received a revised draft of Settlement agreement from IPIC.

> 97.1. Although the 2nd Defendant and Dato Kamal had raised their concerns and reservations and were of the view that 1MDB ought to proceed with arbitration instead, the board of directors collectively and unanimously agreed to settle the arbitration. This was with a specific instruction from the Board members that the sole shareholder Najib Razak give a written instruction and/or directive to the Board to settle the arbitration.

98. *During the Board meeting dated 13.4.2017, it was within Dato Kamal and Dato Sri Norazman's knowledge that, based on the directions and/or instructions of Najib Razak and/or MOF, 1MDB was directed to settle the arbitration between IPIC and Aabar PJS by entering into the Consent Award to pay IPIC USD1.26 billion*.

99. In that regard, *Dato Kamal and Dato Sri Norazman as the Board members and co-directors of the 2nd Defendant had collectively and unanimously agreed and/or sanctioned and/or approved the decision to proceed with the settlement of the arbitration between IPIC and Aabar PJS and to enter into the Consent Award to pay IPIC USD1.26 billion pursuant to the directions and instructions of Najib Razak in his capacity as MOF Inc*.

100. At the material time, *the 1st and 2nd third party knowingly decided to follow, comply, abide and/or participated in the directive and/or instructions given by Najib Razak and/or MOF. Thereby they collectively approved the decision to enter into the Consent Award*.

> 100.1. *This was further made pursuant to the Directors' Resolution dated 10.8.2017, which was signed by the 2nd Defendant, Dato Kamal and Dato Sri Norazman collectively*.

101. Based on the foregoing, *in the event the 2nd Defendant is found liable for wrongfully authorising and agreeing to the Consent Award dated 9.5.2017 and subsequently the Consent Order Payments, Dato Kamal and Dato Sri Norazman as the 1st and 2nd third parties, and as fellow Board members at the material time in which the 2nd Defendant was Chairman ought to make contribution against damages by reason of their direction, participation and/or sanction to the alleged breaches said to be attributed to the 2nd Defendant as pleaded in paragraphs 101.3(b), 101.3(c), 101.4(b) and 101.4(c) of the SOC*.

102. Further, with regards to the allegations of the 1st Defendant's Employment

Extension Agreement, the 2nd Defendant contends that the same was deliberated upon, considered and unanimously approved by the Board including Dato Kamal and Dato Sri Norazman.

103. During the Board meeting dated 4.1.2018, Dato Kamal and Dato Sri Norazman unanimously agreed to and/or approved and/or sanctioned the extension of the 1st Defendant's tenure of employment after extensive deliberation and consideration. As a result, the 1st Defendant's Employment Extension Agreement was approved and sanctioned by all members of the Board at the material time and payments made pursuant thereto for the amount of RM2,905,200.00 ('Ex-Gratia Payment') to the 1st Defendant was made with the full knowledge and approval of all Board members.

103.1. A collective decision, properly scrutinised and deliberated upon, was made by the Board including Dato Kamal and Dato Sri Norazman.

103.2. Ex-gratia Payment to the 1st Defendant were made with the authorisation and/or approval and/or knowledge of Dato Kamal and Dato Sri Norazman and Azmi Tahir as the CFO of 1MDB.

104. In the event, the 2nd Defendant is found liable to 1MDB pursuant to paragraphs 101.5, 101.6 and 101.7 of 1MDB's SOC, Dato Kamal and Dato Sri Norazman, as the 1st and 2nd third party ought to make contribution against damages by reason of their direction, participation, knowledge and/or approval in the alleged breaches attributed to the 2nd Defendant regarding the Employment Extension Agreement.

IRWAN'S CLAIM AGAINST AZMI

[15] The claim against Azmi (third party) can be gathered from the following matters as pleaded in Irwan's statement of claim:

H. INVOLVEMENT OF AZMI TAHIR AND TAN SRI LODIN IN RELATION TO THE ALLEGATION OF BRAZEN SKY INVESTMENT AND THE USD3.5 BILLION PAYMENT

59. Without derogation to Irwan's Defence and Counterclaim and in the event, Irwan is found liable to the Plaintiff, whether in the sum claimed or any part thereof, or interest or costs howsoever arising, Irwan claims to be indemnified by the 3rd and 4th third parties in respect of any sums, he may be held liable to pay aforesaid and in respect of his own cost in defending the action and the costs of third party proceedings, upon the grounds hereinafter pleaded.

H.1. Azmi Tahir

60. The matters and events pleaded in 1MDB's claim with respect to the Brazen Sky Investment and the USD3.5 Billion Payment occurred between 2009 and 2012 and 2012 to 2014 respectively.

In that regard:

60.1. The *investment made by Brazen Sky into the Bridge Global Fund in September*

2012 as pleaded in paragraphs 21 and 22 of the SOC.

60.2. The events in particular, *the so-called inconsistent representations made by Azmi Tahir to the Board and his lackadaisical conduct throughout the investigation of the Brazen Sky investment and the public statements made throughout 2015*, as pleaded in paragraphs 24 to 30 of the SOC.

60.3. The purported concerns raised by KPMG and Deloitte in relation to the Brazen Sky Investment and the reasons behind Deloitte's resignation as the then auditor of 1MDB as pleaded in paragraphs 31 to 33 of the SOC.

60.4. *Azmi Tahir as CFO and signatory to the account of 1MDB was responsible and was authorised to make payments and to verify the authenticity and legitimacy of the USD3.5 billion Payment. As CFO, Azmi Tahir was responsible to ensure that the said payments was made to the correct and/or legitimate entity(ies)*;

60.5. *Azmi Tahir was responsible for updating the Board with correct, accurate information about the Brazen Sky Investment and obtaining and showing the relevant documents reflecting the transfer of the said funds for the USD3.5 billion Payment upon query from the Board*.

61. In that regard, *if at all 1MDB has suffered losses as a result of the Brazen Sky Investment and the USD3.5 billion Payment, the proper parties responsible for and/or accountable for occasioning such loss to 1MDB (if any) would be the Previous Board of Directors and the Senior Management at the material time the Brazen Sky Investment and the USD3.5 billion Payment was made*, comprising of the following individuals:

61.1. Tan Sri Lodin, The 4th third party;

61.2. Tan Sri Ismee;

61.3. Tan Sri Ong;

61.4. Ashvin;

61.5. Datuk Shahrol;

61.6. *Azmi Tahir*; and

61.7. Terence Geh.

62. *This has also been acknowledged by 1MDB throughout their pleaded claim at paragraphs 52 to 59 and 62 to 68 of the SOC pertaining to allegations of wrongdoing by* the 1st Defendant, Datuk Shahrol, Hazeem Abdul Rahman, *Azmi Tahir* and Terence Geh.

62.1. *1MDB alleges that the key perpetrators involved in causing this loss are* Datuk Shahrol, Azmi Tahir and Terence Geh. [Refer to paragraphs 50.1 (a), 50.2, 50.3, 77.2, 77.4, 78.1 of the SOC]

62.2. The above position is further fortified by 1MDB's pleaded case against the primary wrongdoers in Kuala Lumpur High Court Suit WA 22NCC-212–05/2021 ('the Najib Razak Suit').

62.3. In that respect, it is clear that *the Previous Board of Directors, the Senior Management and/or MOF had full knowledge and thereby consented to, authorised*

and/or approved the USD3.5 billion Payment.

63. As a result of the events as stated in paragraphs 32–37 above, which led to the criticism and adverse publicity regarding 1MDB's debt, sometime in or about May 2015, Public Accounts Committee ('PAC') instituted proceedings against 1MDB. PAC called several key officers from 1MDB and various government agencies to assist in the investigation. The proceedings culminated in the issuance of the PAC Report in early April 2016.

64. The PAC Report included the following findings, observations and/or recommendations concerning 1MDB:

64.1. The financing structure of capital and financial performance of the 1MDB group was not satisfactory;

64.2. The practices of the then 1MDB management and Board led to weak governance, in particular, the failure of the Datuk Shahrol (the former CEO of 1MDB) in the manner he managed the company;

64.3. That the management had transferred monies without the approval of the Board;

64.4. That from as early as November 2014, the Government was constrained to take immediate action to bailout and fix the cash flow problems of 1MDB;

64.5. The then Board failed to discharge their responsibilities and safeguard the interests of the company and its shareholders; and

64.6. That strategic research to solve 1MDB's problems was done in February 2015 and a rationalisation plan was thereafter submitted to the Cabinet in May 2015.

65. *Pursuant to the Board meetings from 2009 till 2018, Azmi Tahir, was and had always been tasked and/or responsible to brief and guide the Board Members with regards to matters concerning the investment portfolio held by Brazen Sky Limited, the payments made and status of the USD3.5 billion Payment and the general regular financial updates of 1MDB*.

65.1. This is *evident of Azmi Tahir's scope, role and responsibility as CFO during the Board meetings amongst others* dated 17.11.2015, 14.12.2015, 29.12.2015, 16.6.2016, 25.7.2016, 25.8.2016, 4.1.2017, 21.2.2017, 23.3.2017, 25.8.2017, 27.9.2017, 13.4.2017, 4.1.2018, *wherein the Board requested Azmi Tahir to provide updates and Azmi Tahir provides so*.

66. In his capacity as the CFO of 1MDB, *Azmi Tahir was part of the Senior Management team of 1MDB. As the CFO, Azmi Tahir was the signatory of 1MDB's account and therefore was the custodian of 1MDB's assets*.

67. *As CFO and former director of 1MDB's subsidiaries including his directorship in Brazen Sky Limited from 7.8.2012 to 18.9.2018, Azmi Tahir possessed first-hand knowledge and/or ought to have to have had knowledge of events surrounding Brazen Sky Investment that included amongst others*:

67.1. Authorised payments and/or transfers on behalf of 1MDB and its

subsidiaries to several overseas investments used as conduit to misappropriate funds from 1MDB's subsidiaries;

67.2. Approved the proposal to subscribe for shares of Bridge Global Fund for the account of 6 segregated portfolio with subscription prices of USD2,318,000,000 in consideration for assignment by Brazen Sky of 6 Promissory Notes to Bridge Global Fund without any and/or any proper due diligence done prior;

67.3. Executed agreements for the raising of 2013 Bond worth USD3,000,000,000;

67.4. Signed facility agreement between 1MDB's subsidiary, 1MEHL and Deutsche Bank, authorising 1MBD's subsidiary, 1MEHL to borrow up bridge loan facility of up to USD250,000,000.00 to finance Aabar acquisitions;

67.5. Approved procurements of loan and/or transactions entered into between 1MDB's subsidiary, 1MEHL and Aabar PJS; and

67.6. The authorised signatories, that have the authority to provide instructions and sign other documents in relation to the loan to finance the acquisition of Aabar PJS.

68. Perusal of the documents including the minutes of meetings of 1MDB produced by 1MDB will show that *despite having knowledge of the concerns raised by the external auditor for 1MDB, KPMG and subsequently Deloitte, Azmi Tahir failed and/or refused and/or neglected and/or omitted to take any appropriate action and/or steps to defray their concern by providing the information and/or documents requested by KPMG and Deloitte. Instead, he feigned ignorance and continued to misrepresent matters involving Brazen Sky Investment and its purported repatriation to the board members*.

69. *Azmi Tahir was aware of KPMG's hesitation and reluctance to sign 1MDB's financial statements for year ending March 2013*. In this regard, Azmi Tahir:

69.1. Knew and/or ought to have known that KPMG was mainly concerned about the lack of information and documents to verify the Brazen Sky Investment and required evidence of its existence, accuracy, legitimacy, completeness and valuation;

69.2. As CFO, Azmi Tahir ought to have been in a position to provide, forward and explain to KPMG its request on 11.12.2013 and prior to that to verify the fair value of Brazen Sky Investment in Bridge Global. This included confirming the ownership of investments of Bridge Global by BSI Bank and the report on the net asset value ('NAV') in Bridge Global on 31 March 2013 and to have in his possession the supporting documents showing how NAV was obtained;

69.3. Knew and/or ought to have known that the Board at the material time was unaware and/or did not have knowledge of the status of the proceeds from the redemption of the investment portfolios held by Brazen Sky Limited as the same was solely handled and managed by Azmi Tahir and general counsel Jasmine Loo.

70. *Despite the concerns and repeated requests by KPMG, Azmi Tahir proceeded to cause the following to transpire*:

70.1. Arranged a meeting with the sole shareholder of 1MDB, Najib Razak upon the request of KPMG. The said meeting took place sometime in 15.12.2013 December 2013 at Najib Razak's private residence;

70.1.1. At the said meeting, which was attended by the managing partner of KPMG, Azmi Tahir, Tan Sri Lodin, and the then Chief Executive Officer, Mohd Hazem. Azmi Tahir was aware that Najib Razak did not want to disclose the details of the Brazen Sky Investment on the purported grounds of confidentiality.

70.1.2. Failed, refused and/or intentionally neglected to advise Najib Razak that confirming the value of the underlying assets of the Bridge Global Absolute Return Fund Investment was essential, vital and crucial for disclosure to the external auditors so as to ensure that the audit can be completed in accordance with the International Standards of Auditing and Financial Reporting Standards.

70.2. Azmi Tahir was aware that two (2) weeks after the aforementioned meeting with Najib Razak, the services of KPMG were terminated effective immediately on 10.1.2014 by 1MDB's sole shareholder, MOF Inc through a letter dated 31.12.2013 without apparent justified reasons. This was also within the knowledge of Tan Sri Lodin.

70.3. Despite KPMG's concern and the abrupt termination of KPMG's services, Azmi Tahir and Tan Sri Lodin refused, failed and/or omitted to inform the Board at the material time of the above circumstances, in particular the importance of obtaining the necessary information and documents in relation to the Brazen Sky Investment.

70.4. Failed, refused and/or omitted to conduct his own verification and due diligence as to the legitimacy and accuracy of the Brazen Sky Investment although this was part of his responsibilities and scope as CFO of 1MDB.

70.5. At or around the later quarter of 2014, Azmi Tahir negligently and fraudulently misrepresented to the Board and deceived them into believing that the proceeds from the redemption of the Brazen Sky Investment at a total sum of USD2.318 billion had been repatriated when in actual fact they had not been.

70.6. Azmi Tahir had not given accurate information and/or was not transparent and/or intentionally and deliberately concealed information regarding the entire process of redemption of the said investment to the Board of directors and to the external auditors.

70.7. Azmi Tahir knew and/or ought to have known that in November 2014, only USD1.22 billion was initially partially redeemed of which USD993 million had been paid to Aabar for the termination of the Aabar options, which exceeds the sum stated in the Settlement Agreement for the termination of the options.

70.8. Failed and/or refused and/or omitted to inform and/or advise the Board at the material time that the proceeds from the redemption of the investment

portfolios amounting to USD2.318 billion held by Brazen Sky Limited had been charged to Deutsche Bank as a guarantee on the loan amounted USD975 million.

70.9. This was a fact that Azmi Tahir knew and/or ought to have known prior but only informed the Board on 20.12.2014 which showed that the decision was made without the special approval from the Board of Directors.

70.10. *Had knowledge and/or ought to have known the numerous red flags and/or doubts and/or suspicions concerning the Brazen Sky transactions and that the Brazen Sky Investment did not bring any economic benefit for 1MDB. Nonetheless, Azmi Tahir failed and/or refused and/or omitted to conduct a proper due diligence and scrutiny of the said investment, nor did he investigate, question and/or clarify any such suspicion and/or doubt*.

70.11. *Made payment for the Aabar options without the requisite approval, sanction and/or consent of the Board at the material time*.

70.12. Was fully aware and/or ought to have been aware of all the circumstances in which the payment of USD3.5 billion was made to Aabar BVI.

70.13. *Nevertheless, willfully neglected to inform and/or concealed and/or reckless omitted to inform the Board that Aabar PJS and Aabar BVI are two different entities*.

71. In furtherance of the abovementioned conduct, *Azmi Tahir acted without the approval, authorisation and sanction from the Board with regards to matters concerning Brazen Sky Investment and the USD3.5 billion Payment*. Instead, *Azmi Tahir took instructions from Low Taek Jho* ('Jho Low') and Datuk Azlin Alias ('Datuk Azlin'), Najib Razak's personal aide from as early as 2012, pertaining to issues and matters relating to 1MDB. *This was done despite knowing that Jho Low and Datuk Azlin had no official position, role or involvement in 1MDB whatsoever*.

71.1. Despite knowing that Jho Low held no official position, role or involvement in 1MDB and without being instructed directly by the sole shareholder of 1MDB, Najib Razak, Azmi Tahir took instructions and/or directives from Jho Low, kept him updated on matters discussed and decided by 1MDB;

71.2. *Azmi Tahir knew and/or ought to have known that matters pertaining to Brazen Sky Investment and the USD3.5 billion Payment were done without the authorisation and/or consent, approval and/or sanction of the Board at the material time and that the Board members were not properly, accurately and/or neither well informed of all facts, evidence and/or shown, given documents relating to the Brazen Sky Investment and the USD3.5 billion Payment, yet proceeded on the basis of instructions and/or directions from Jho Low*;

71.3. Azmi Tahir had no reason to inform Jho Low prior to the proposed meeting on 15.12.2013 which KPMG had requested with Najib Razak pertaining to their concerns on the inadequate explanation and documents relating to the Brazen Sky Investment (as referenced in paragraph 67 above). Azmi Tahir also received an email from Jho Low concerning the financial

situation of 1MDB, including details of the purported government guaranteed debt prior to the said meeting.

71.4. Having acted upon instructions from Jho Low and/or Datuk Azlin, Azmi Tahir failed, refused, neglected and/or omitted to inform the Board of the same. At all material times certain members of the Board were unaware and/or uninformed that Azmi Tahir had received instructions and/or directives to proceed with payments, mandates and/or ultimate decisions made for and on behalf of 1MDB.

71.5. Azmi Tahir was content and/or satisfied receiving directives and/or instructions from Jho Low and/or Datuk Azlin without informing, verifying and/or confirming such instructions and/or directives with the Board and/or with 1MDB's sole shareholder.

72. Despite the numerous suspicious, questionable and/or doubtful circumstances within the knowledge of Azmir Tahir and Tan Sri Lodin surrounding the Brazen Sky Investment, neither Azmi Tahir nor Tan Sri Lodin raised these matters of concerns to the attention of the other members of the Board of 1MDB. This deliberate and/or reckless omission was presumably due to a fear of losing their jobs and positions within 1MDB. They failed to take any appropriate steps and/or actions to question, interrogate and investigate the relevant persons regarding these shortcomings.

73. During the 2nd Defendants tenure as Chairman of 1MDB, the 2nd Defendant will aver that Azmi Tahir in his capacity as the CFO and director of Brazen Sky Limited continued his task duty and/or responsibility to brief the Board pertaining to the Brazen Sky Investment and the USD3.5 billion Payment and proceeded to do so during numerous Board meetings inter alia on 16.6.2016 and 25.8.2016.

73.1. The Board directed Azmi Tahir to take all requisite steps to liquidate all funds whenever possible and expeditiously either by redemption, private treaty or otherwise by any means in order to realise the cash value for the purpose of the settlement and discharge liabilities relating to the Company's USDbond obligations.

73.2. In line with the Boards direction to redeem the Brazen Sky investment proceeds, that Azmi represented that he was in constant discussions with the fund managers to explore the viability of redeeming a portion of investment funds.

73.3. Azmi Tahir deliberately concealed and/or evaded the Board members request to meet the fund managers for an explanation and dismissed such request with vague reasons.

73.4. Azmi Tahir initially advised the Board that it is best to do so via a debt asset swap with IPIC as the funds were allegedly guaranteed by Aabar.

73.5. Azmi Tahir was also directed by the Board to produce all documents and evidence to ascertain and verify that the USD3.5 billion Payment was made to Aabar BVI as he was involved in the said transaction and was authorised to do so by the previous Board. However, in subsequent board meetings, Azmi Tahir

could not confirm such documentation exists an sought to place the blame on his subordinate Terrence Geh.

73.6. *Azmi Tahir continued to mislead the Board with incorrect, vague, imprecise and inaccurate information regarding the Brazen Sky Investment and the USD3.5 billion Payment. In particular, when asked for proof and evidence of the USD3.5 billion Payment, Azmi Tahir represented that Deloitte had met the CEO of Aabar who confirmed the authenticity of the payment and that 1MDB also has the MT (remittance documents) for each payment*.

74. Azmi Tahir made and/or caused to be made several representations to the Board during its board meetings on 23.3.2017 and 13.4.2017 all of which the Board members relied on and approved resolutions based on. The said representations are *inter alia* as follows:

74.1. After several months of the Boards attempts and follow ups with Azmi Tahir regarding the redemption of Brazen Sky Investment, it was Azmi Tahir proposal that an internal restructuring of the ownership of the fund units followed by monetisation of the fund units via a sale of shares be conducted.

74.2. Azmi Tahir represented to the Board that this said proposal was discussed by him within the MKD Team and/or GIC in MOF and it was agreed that the fund units under the ownership of 1MDB-GIL will be transferred to Brazen Sky, thereafter, Brazen Sky would be sold to MOF Inc wholly owned company, Anggerik Biru. Anggerik Biru will then sell Brazen Sky, on a 'back-to-back' basis to the end buyer, Midas Commodities Agents Limited, a company incorporated under the laws of the Seychelles.

74.3. Azmi Tahir confirmed that the transfer of shares and/or ownership of Brazen Sky to the end buyer would only occur upon receipt of the full purchase price payment of USD2,433,801,295.

75. Azmi Tahir would have known and/or ought to have known that it is within reasonable contemplation of the Board members that they would rely on the information and representations of Azmi Tahir with regards to Brazen Sky Investment and the redemption of the same and the USD3.5 billion Payment because it was at all material times within the scope and responsibility of the CFO who dealt with the same from the onset and was the person responsible for the development and accordingly the update.

76. *The 2nd Defendant contends that in the event the 2nd Defendant is found liable of the breaches (as stated in 1MDB's Claim at paragraphs 101.2(b), 101.2(c), 101.3(b), 101.3(c), 101.4(b) and 101.4(c)) for the alleged damages arising from the Brazen Sky Investment and the USD3.5 billion Payment, then the 3rd third party is liable to indemnify the 2nd Defendant*.

77. In this regard, the 2nd Defendant contends that Azmi Tahir and Tan Sri Lodin had knowledge and/or ought to have knowledge and thereby consented to, authorised and/or approved and/or sanctioned the payment of USD3.5 billion being monies purportedly misappropriated from 1MDB to Aabar BVI and Aabar Seychelles. As Chairman, Tan Sri Lodin was content for the Senior Management to deal with and make the said payments without enquiring and verifying the veracity

and authenticity of the entity receiving the said sums.

77.1. Had Tan Sri Lodin enquired, sought clarification, insisted on the information and/or evidence of the USD3.5 billion Payment, he would have known that USD3.5 billion was misappropriated to Aabar BVI and Aabar Seychelles.

78. Irwan contends that in a Board Meeting dated 23.2.2015, Tan Sri Lodin acknowledged that the Board had not been properly and accurately briefed regarding the following:

78.1. Redemption of investment portfolios held by Brazen Sky Limited;

78.2. That the actual amount paid for Aabar options was only informed to the Board after the payment was made;

78.3. That there were instances where the Board had been requested to sign circular resolution regarding investments without the benefit of detailed evaluation and discussions on the said investment before an important decision is made; and

78.4. That the Board was not informed that the payment of the Aabar options was made from the proceeds of the redemption of the investment portfolios.

79. Despite the above, Tan Sri Lodin as the Chairman of 1MDB, willfully neglected, failed and/or refused to take any and/or appropriate actions and/or steps:-

79.1. Against the principal wrongdoers as stated in 1MDB's SOC and/or against Azmi Tahir and/or Mohd Hazem.

79.2. To verify and ascertain the legitimacy and authenticity and to take steps to recover the Brazen Sky Investment despite being fully aware of the concerns raised by KPMG and Deloitte.

79.3. To verify the payments of USD3.5 billion made to Aabar BVI.

80. In this regard, the Azmi Tahir and Tan Sri Lodin as the 3rd and 4th third parties are the proper parties responsible for causing loss and damages involving Brazen Sky Investment and the USD3.5 billion Payment to 1MDB as pleaded by 1MDB against the 2nd Defendant at paragraphs 101.2 (b), 101.2(c), 101.3 (b), 101.3(c) and 101.4 (b), 101.4 (c) of the SOC.

81. In the event, the 2nd Defendant is found liable for the alleged damages arising from the Brazen Sky Investment and the USD3.5 billion Payment, then Tan Sri Lodin as Chairman of 1MDB at that material time ought to indemnify the 2nd Defendant against damages by reason of his direction, participation and/or sanction and/or omission and/or failure and/or neglect arising thereto.

HIGH COURT

[16] The judicial commissioner's reasons for allowing encl 236 and encl 241 may be gathered from the following parts of the broad grounds:

ENCLOSURE 236 — THIRD PARTIES NOS 1, 2 AND 5

[28] I will now discuss the issues relating to third parties Nos 1, 2 and 5. Datuk Kamal bin Mohd Ali ('Datuk Kamal') is Third Party No 1, Datuk Seri Norazman bin Ayob ('Datuk Seri Norazman') is third party No 2 and Datuk Seri Asri bin Hamidon ('Datuk Seri Asri') is third party No 5.

[29] In regard to the third party notice involving them, Tan Sri Irwan took the following positions.

[30] Regarding Datuk Kamal and Datuk Seri Norazman, Tan Sri Irwan alleges that these two gentlemen previously sat alongside him on the 1MDB's board. During this time, Tan Sri Irwan also served as Chairman of 1MDB. At all times, they were briefed by third party No 3 ('Azmi bin Tahir') about the redemption of Brazen Sky Ltd's investment portfolio and the USD3.5 billion payment to IPIC and Aabar Seychelles. Accordingly, the board members agreed to proceed with the settlement of IPIC and Aabar Investments PJS' arbitration dispute. It was allegedly based on directives given by Dato' Seri Najib Razak as shareholder's representative. In addition, they participated in the discussion and deliberation of the employment extension agreement.

[31] Following the above, Tan Sri Irwan argues that third parties Nos 1 and 2 were joint tortfeasors that had been involved in the tort or wrong complained of by 1MDB. According to Tan Sri Irwan, all the third parties named herein had the ability to influence the deliberations, discussions and/or decisions involving 1MDB's affairs.

[32] Furthermore, regarding Datuk Seri Asri, who succeeded Tan Sri Irwan as chairman of 1MDB, Tan Sri Irwan claims that Datuk Seri Asri participated in the rationalisation plan for 1MDB as a member of the Budiman Committee and later Team Negaraku, which committee and team were formed by the Ministry of Finance ('MOF'), thus having intimate knowledge of the company's affairs, including the Brazen Sky Ltd's investment and USD3.5 billion payment to IPIC and Aabar Seychelles based on Azmi Tahir's representations. According to Tan Sri Irwan, 1MDB paid USD1.26 billion to IPIC and its unit Aabar Investments PJS in accordance with the consent award dated 9 May 2017. In accordance with the settlement, Datuk Seri Asri is alleged to have made the payment as instructed and directed by Dato' Seri Najib Razak. Additionally, Datuk Seri Asri sought to set aside the Consent Award in the London arbitration after it was alleged that he was deceived and misled into entering the consent award by Dato' Seri Najib Razak. Moreover, he was said to have overseen the appointment of 1MDB's CEO under Team Negaraku.

[33] In the following section, I will discuss positions involving Datuk Kamal and Datuk Seri Norazman, and where applicable, Datuk Seri Asri as well.

[34] In analysing whether Datuk Kamal, Datuk Seri Norazman and Datuk Seri Asri ought to remain as third parties in this suit, I would focus my attention on whether, based on the pleadings of Tan Sri Irwan, there are sufficient essential ingredients to tie them up as joint tortfeasors with the alleged conduct claimed against Tan Sri Irwan by 1MDB. By the end of the exercise, I must be able to determine whether Tan Sri Irwan's statement of claim against Datuk Kamal, Datuk Seri Norazman and

Datuk Seri Asri discloses a reasonable cause of action.

[35] In this regard, it is trite that for Tan Sri Irwan to claim for an indemnity from Datuk Kamal, Datuk Seri Norazman and Datuk Seri Asri in the event that Tan Sri Irwan is found liable towards 1MDB's claim, Tan Sri Irwan must prove that Datuk Kamal, Datuk Seri Norazman and Datuk Seri Asri were joint tortfeasors.

[36] As a starting point, Tan Sri Irwan appears to be imposing fiduciary, common law and/or statutory duties upon Datuk Kamal and Datuk Seri Norazman. The first is towards 1MDB and the second is towards Tan Sri Irwan since both are board members at 1MDB.

[37] In relation to the first issue involving such alleged duties against 1MDB, it seems to me that *Tan Sri Irwan has no right to impose such duties on Datuk Kamal and Datuk Seri Norazman. As a fellow director, not only does Tan Sri Irwan lack the capacity to enforce such duties, but it appears to me that 1MDB also does not intend to bring or maintain any such claim against Datuk Kamal and Datuk Seri Norazman, and 1MDB is the rightful party to file such claims*.

[38] As such, *it is up to the company to decide which Board members to sue depending on whether they were executive or non-executive directors and whether their action or inaction caused losses to the company. The critical fact to remember is that just knowing the wrong was committed does not automatically entail a director being sued as a joint tortfeasor*. The illustrious analysis and explanation of these specific issues were provided by His Lordship Lee Swee Seng (as His Lordship then was) in *Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)* [2012] 9 MLJ 464. His Lordship shared the following wisdom at pp 488, 492, 496 and 497:

> [73] Thus when these non-executive directors are sought to be brought in as third parties one must ask the question as to whether the acts complained of are those that are predominantly and peculiarly that expected of and exacted from executive directors or are they acts attributed or attributable to non-executive directors. As what is claimed are actions arising out of the execution, implementation, supervision and operation of the projects; these are matters within the prime and pure purview and powers of the executive directors. *To rope in the other non-executive directors by way of a third party proceeding when the company has no intention of pleading and pursuing against them in the pleading before us as formulated on a breach of fiduciary duties and negligence of the executive directors, would be to blur the distinction to the detriment of the other Board members and the company as a whole*. Every Board would be reluctant to pass a resolution to claim against any of its executive directors in the name of the company as every other director including the non-executive ones may be roped in and be made responsible in every way as the executive directors through the doctrine of collective responsibility with its concept of a right to contribution from all the other directors.
>
> [74] The *duties of a non-executive director are not co-extensive with the duties of an executive director vis a vis the company on whose Board they sit*. Neither are the acts which the plaintiffs alleged against the first and second defendants, acts which the first and second defendants have alleged against the third parties. All that the

first and second defendants are saying in their statement of claim against the third parties are that the third parties are aware of and have approved of all the actions of the first and second defendants. If that be the case than it appears to be a complete defence for the first and second defendants and bringing in the third parties would be unnecessary.

...

[83] As was carefully stated in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 at p 1058, for joint liability to arise, the person in question must be directly involved, ie he must procure the tort as opposed to merely facilitating it. There must be the element of a positive act of participation in and procurement of the tort as in inciting and encouraging it.

Mere knowledge that the tort has been committed or could be committed is not sufficient to rope the person in as a joint tortfeasor. See also the case of *PLG Research Ltd v Ardon International Ltd & Ors* [1993] FSR 197 at pp 238–239 where it was explained by Aldous J as follows:

I believe it is clear that a director will not be liable unless his involvement would be such as to render him liable as a joint tortfeasor if the company had not existed. For example, the law distinguishes between facilitating and procuring a tort. A person who only facilitates a tort is not liable as a joint tortfeasor whereas a person who procures the tort is liable ...

What amounts to facilitating a tort will vary from case to case, but as Mellish LJ said in *Townshend v Hawarth* (1879) 48 LJ Ch 770 at p 773:

Selling materials for the purpose of infringing a patent to the man who is going to infringe it, even although the party who sells it knows that he is going to infringe it and indemnifies him, does not by itself make the person who so sells an infringer. He must be a party with the man who so infringes, and actually infringe.

[84] The third parties also pointed out that a claim for contribution is in effect a claim to a partial indemnity and it usually arises between joint debtors, joint tortfeasors and the like. I agree that the right to contribution depends on whether liability was co-ordinate, in the sense that liability is of the same nature and to the same extent. Parties must be in *pari delicto* and a party who is guilty of fraud, illegality, wilful misconduct or gross negligence is not entitled to contribution from his fellow directors when it has not been pleaded how they have been a participating party to the fraud, illegality, wilful misconduct or gross negligence.

...

[98] I think a distinction must be made between an action by a company against its directors or some of them for damages arising out of the directors' breach of fiduciary duties and/or negligence and one where an outsider or shareholder is claiming against the directors of the company. In the case of the former the company is at liberty to hold the directors accountable according to the duties and tasks assigned to them and generally that will emanate from whether they are performing an executive or a non-executive role ...

> [103] That is to be distinguished from the directors as defendants bringing in the other directors not being sued as third parties. It is for the plaintiff companies to decide who to sue from among its Board members whose action or inaction have caused losses to the company.

[39] It is, therefore, not Tan Sri Irwan's concern about who the plaintiff should or should not have sued. Speaking for the Supreme Court, His Lordship Edgar Joseph Jr SCJ at p 150 in *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143 observed:

> The learned appellate judge went on to remind himself of the well-known proposition that in an action in tort the plaintiff has a free hand as to whom to sue. The plaintiff is not now, and never was, obliged to join as a defendant every person who was liable to him for that tort. He may, if he prefers, sue one or two; and the liability of the others will be no defence to those sued, and will not mitigate the damage recoverable, for all persons concerned in a common wrongful act are jointly and severally liable for all damage caused by it (see *Odgers on Pleading and Practice* (20th Ed) at p 20).

[40] Moreover, it is trite that Datuk Kamal and Datuk Seri Norazman, as directors, owed no duties to Tan Sri Irwan, being a fellow director at the time.

[41] As a starting point, the Federal Court in *The Board of Trustees of The Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469 thoroughly analysed the position of a fiduciary. In delivering the judgment of the Federal Court, His Lordship Zulkefli FCJ (as His Lordship then was) examined the law on fiduciary duties as follows at pp 488 and 489:

> [30] We would approach the issue raised in this appeal by first examining whether DSK is in a position of a fiduciary. It further follows if DSK is in the position of a fiduciary whether he had committed any breach of fiduciary duty. In law the position of the fiduciary and his obligation have been succinctly stated by Millet LJ in the English case of *Bristol and West Building Society v Mothew* [1998] Ch 1 to be as follows:
>
> > A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets.
> >
> > A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere competence is not enough. A servant who loyally does his

incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

[42] As an analysis of the facts in our present case shows, a director only has a fiduciary duty to the company, not to his fellow directors. In *Dato' Abul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor* [2012] 5 MLJ 176, His Lordship Abdul Malik Ishak JCA, writing for the Court of Appeal, held to the following effect at p 183:

> [22] The law is quite simple. A director owes no duty to his fellow director. His duties as a director are owed to the company. The duties of a director are amply set out in s 132 of the Companies Act 1965 and it reflects the common law position.
>
> [23] It must also be borne in mind the principle that when a director has misapplied the company's funds by advancing money for a non-authorised purpose, he is not entitled to obtain contribution from the other directors (*Re Kong Thai Sawmill (Miri) Sdn Bhd, Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors* [1976] 1 MLJ 59 (FC)). In our judgment, the second defendant failed to show a prima facie case that would entitle him to secure leave to issue third party notices against the six directors of the first plaintiff.

[43] I have also reviewed Tan Sri Irwan's statement of claim against the third parties. In this regard, it appears that the relevant paragraphs of Tan Sri Irwan's statement of claim, which incorporated the alleged cause of action against Datuk Kamal and Datuk Seri Norazman, exonerate both persons. According to the averments made by Tan Sri Irwan himself, the events surrounding the Brazen Sky Ltd's investment occurred between 2009 and 2012 before Datuk Kamal, Datuk Seri Norazman and even Tan Sri Irwan were appointed as directors. Therefore, Tan Sri Irwan further alleged that they have no prior personal knowledge of the decisions, conduct and/or directions taken by the previous board members and/or senior management team members. A similar position seems to be taken by Tan Sri Irwan regarding the USD3.5 billion payment that took place some two years before they became board members.

[44] Upon further examination of Tan Sri Irwan's statement of claim, I find that Tan Sri Irwan does not allege that Datuk Kamal and Datuk Seri Norazman were joint tortfeasors. Clearly, this is understandable since Tan Sri Irwan did not claim to be a tortfeasor in his defence to 1MDB's claim. Therefore, if Tan Sri Irwan claims that he is not a tortfeasor, how can his fellow directors be joint tortfeasors? Tan Sri Irwan, therefore, cannot claim that both Datuk Kamal and Datuk Seri Norazman are joint tortfeasors if he asserts that it was allegedly a proper affair at the Board level. There is no doubt that the two positions cannot be combined.

[45] Consequently, even if the matter proceeds to trial, I would not be able to determine Datuk Kamal, Datuk Seri Norazman and Datuk Seri Asri's roles and obligations because they were not joint tortfeasors. It is insufficient to bring the third parties into this action simply because they were allegedly aware of and approved of all the actions, or were aware of the alleged tortious conduct that was committed or could be committed at the time.

[46] Therefore, the findings above are also applicable to Datuk Seri Asri. Similarly, my earlier findings regarding Datuk Johan Mahmood's status and position apply to Datuk Seri Asri's.

[47] As a final point, I also find that the filing of the third party proceedings on 30 May 2024 has been inordinately delayed. Tan Sri Irwan filed his leave application three years after the plaintiff's suit was commenced on 21 May 2021. This is despite the fact that the trial has already been scheduled to begin on 2 September 2024.

[48] In this context, His Lordship Kang Hwee Gee J (as His Lordship then was) dismissed an appeal in *Kewangan Bersatu Bhd v Victory Ceramics Industries Sdn Bhd & Ors* [2002] 5 MLJ 225 on the grounds that a party did not provide a valid reason for the delay of four years in initiating third party proceedings. The following is His Lordship's observation at pp 231 and 232:

> It must be noted here that the suit was filed some four years ago.
>
> No valid reason was advanced by the fifth defendant as to why it had taken him such a long time to decide to join the proposed not one but three third parties in this action apart from saying in para 20 of his affidavit that he was no longer managing the first defendant's company as it had now been wound up.
>
> It is clear that the fifth defendant's application is an abuse of the process of the court, which a responsible counsel would not have filed. To bring in other parties at this late stage of the proceedings when case management is being conducted would have the effect of delaying the plaintiff's suit for many more months or even years given the fact that:
>
> (1) the third party claims would have first to be served not on one but three third parties (taking, say, nine months);
>
> (2) each of the third parties may have to file their defence and serve them on the existing parties (taking, say, another six months);
>
> (3) the existing parties may have to amend their defence (taking, say, another six months).
>
> Meanwhile, pending the regularisation of the third party proceedings, the present case management would have to be postponed for another year or so. Had the application been allowed to proceed it would have been unjust to the plaintiff. The fifth defendant on the other hand would have gained an undue advantage at the expense of the plaintiff in not having to answer to the plaintiff's claim sooner.
>
> Appropriately, the fifth defendant should file a separate action against the third parties.
>
> It would be appropriate under the circumstances for the court to exercise its discretion granted under the new O 34A of the Rules of the High Court 1980 case management procedure to order that no third party action should be allowed at this late stage so that the case can be fixed for trial soonest.

[49] On this aspect, there will also be further discussion on the subject of delay below involving encls 239 and 241.

[50] Following the above findings, *encl 236 is allowed* with costs of RM10,000, subject to allocatur.

ENCLOSURES 239 AND 241 — THIRD PARTIES NOS 3 AND 4

[51] Next, I will address the issues related to third party No 3, Azmi bin Tahir ('Azmi Tahir') and third party No 4, Tan Sri Dato' Seri Lodin bin Wok Kamaruddin ('Tan Sri Lodin').

[52] In the case of these two individuals, I find that Tan Sri Irwan was also inordinately delayed in initiating third party proceedings against them.

[53] As I read through Tan Sri Irwan's amended defence and counterclaim to 1MDB's claim, it appears to me that Azmi Tahir and Tan Sri Lodin's names already appeared as early as 18 February 2022. Here, Tan Sri Irwan made it clear that if 1MDB suffered any losses as a result of the Brazen Sky Ltd's investment, the proper parties to blame for and accountable for such losses would be seven members of the Board and senior management during that period of time, including Azmi Tahir and Tan Sri Lodin.

[54] To this end, even if I do not take the timelines from the date of the filing of the suit which was on 7 May 2021, I still think there was a delay of more than two years between the date of the filing of the amended defence and counterclaim and the date of filing the leave to issue third party proceedings on 30 May 2024.

[55] In this sense, Tan Sri Irwan's argument that he had to obtain the documents before instituting third party proceedings cannot be justified. As Tan Sri Irwan had already identified all seven potential third parties in his amended defence and counterclaim, he already knew their alleged roles and conducts in the impugned transactions.

[56] Additionally, nothing prevented Tan Sri Irwan from filing a discovery application against 1MDB, especially when he complained that he had not received the documents after a while. Furthermore, Tan Sri Irwan knew about Azmi Tahir's involvement, including his representations to the board. Moreover, there is nothing stopping Tan Sri Irwan from filing such third party proceedings first and then making any amendments once the documents are received.

[57] Further, it appears that Tan Sri Irwan's solicitors informed 1MDB's solicitors of the nature of the documents that he would need to file the leave to issue third party claims only on 8 November 2023. As early as that date, he knew that he was entitled to file a discovery application. Nothing prevents him from seeking those documents earlier rather than waiting until the end of 2023. It should have become apparent to him after some time that there would be no forthcoming documents coming his way from 1MDB.

[58] Further, even if Tan Sri Irwan waited for the striking out application to proceed first, he could still initiate the third party claim as soon as he received such a decision.

[59] The following effect was observed by His Lordship Abdul Malik Ishak JCA at pp 181–182 in *Dato' Abul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor* [2012] 5 MLJ 176 in relation to the issue of gross and inordinate

delay in filing third party proceedings:

> [14] We acknowledge that there was a delay on the part of the second defendant to issue third party proceedings for indemnity and contribution against the six directors of the first plaintiff. The second defendant took nearly three years to file the third party proceedings. It is a delay that is so gross and inordinate and it abuses the process of the court. We have considered the judgment of Kang Hwee Gee J (later JCA) in *Kewangan Bersatu Bhd v Victory Ceramics Industries Sdn Bhd & Ors* [2002] 5 MLJ 225 in regard to the issue of delay. We have also considered the judgment of Abdul Malik bin Ishak JCA in *Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd* [2009] 2 MLJ 102; [2010] 2 CLJ 457 (CA), about the delay that was said to be too long to endure.
>
> [15] We have also considered the argument that the second defendant has the right to bring a separate action against his fellow directors later. We noted that prior to the filing of the third party notices, the second defendant had not made any demand against the proposed third parties — the six directors of the first plaintiff. And such lackadaisical attitude points to a case of an afterthought on the part of the second defendant. It must be emphasised that the second defendant is not barred under limitation or jurisdiction for that matter from bringing a separate action against the proposed third parties. And it must also be emphasised that the second defendant is not prevented from filing a fresh action against the proposed third parties on the allegations as alluded to by the second defendant in his third party notices.
>
> [60] Since there was an inordinate delay without justifiable grounds for it, I find that this amounted to an abuse of the court's process. As a result, the purpose of having third party proceedings in the main action, which is to save time, costs, and energy on the part of all parties, is also defeated.
>
> [61] To add to what I have already said, I will not be discussing the merits of the cause of action brought by Tan Sri Irwan against Azmi Tahir and Tan Sri Lodin as third parties. This is because I am aware of the positions offered by Azmi Tahir and Tan Sri Lodin that Tan Sri Irwan is always at liberty to bring a separate action against them, subject to the genuineness of the claim. This is why it is not mandatory to pursue third party claims here, especially when it defeats the purpose of saving time and economic savings due to the inordinate delay. Thus, I will reserve Tan Sri Irwan's interest and rights towards them for later action, if any.
>
> [62] As such, I am allowing encl 239 with costs of RM10,000, subject to allocatur. I am also allowing encl 241 with costs of RM10,000, subject to allocatur.

OUR DECISION

[17] The main question here is whether the learned judicial commissioner had misdirected himself in striking out the third party action against Kamal, Norazman and Azmi. It is quite clear from the facts as narrated in the pleadings and submissions before us that the impugned transactions which are the subject matter of the main 1MDB suit took place during the tenure of Azmi, the former Chief Financial Officer ('CFO') of 1MDB. 1MDB sued Irwan for

breach of fiduciary duties, common law duties, and breach of contractual and statutory duty to act honestly and in good faith in the best interest of 1MDB. At least two of the transactions namely the consent award in the London Arbitration and Arul Kanda's extension of employment contract occurred whilst Irwan was Chairman and a member of 1MDB's Board of Directors.

[18] Irwan has filed a comprehensive statement of claim against Azmi and against Kamal and Norazman. In so far as the claim against Azmi is concerned, no doubt, the claim is based on 'indemnity' and not contribution, but we do not think that this is fatal as this can be remedied by an amendment. As such, the question now is whether the third party claim against these parties was correctly struck out for the reasons stated in the judicial commissioner's grounds of judgment.

[19] As for 'delay', we think that having regard to the entire matrix of facts, including the fact that parties were dealing with Irwan's striking out application, and that there was an agreement for pleadings to be put in abeyance, there was really no inordinate delay on the part of Irwan in taking out third party proceedings. It is quite apparent that at all material times, Irwan's solicitors were waiting for documents from 1MDB's solicitors, who had initially given the impression that they would supply everything that was asked by Irwan's solicitors. However, 1MDB's solicitors later resiled and said they would not be giving the requested documents. Of course, had they stated their position from the earliest onset, Irwan would have applied for discovery.

[20] Hence, the delay here was to a large part contributed to by 1MDB who declined to give the documents, but only did so after the third party action was filed. Of course, in between, 1MDB had provided some, but not all the documents.

[21] In light of these developments, it cannot be said that Irwan, who left 1MDB without any documents, was guilty of delay. In our view, the issue of delay must in any event, be examined and considered in the context of the case of *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping Perak & Ors* [1989] 1 MLJ 226; [1988] 1 MLRA 294; [1989] 1 CLJ Rep 98 (SC), where it was held that third party action for indemnity or contribution is an independent and separate action from the main action and the cause of action or time begins to run only when the defendant is found liable for the plaintiff's action against the defendant. The facts of *Mat Abu's* case were as follows. There was a road accident on 14 July 1981 involving a motorcar driven by the appellant and a motorcycle. The motorcyclist and his pillion rider sustained injuries. On 16 July 1981, the motorcyclist died at the Taiping General Hospital of septicaemia and gas-gangrene secondary to multiple fractures. On 19 July 1983, the administrator of the estate of the deceased motorcyclist,

together with the pillion rider, brought an action claiming damages against the appellant. On 4 January 1985 the appellant took out third party notices against the Superintendent, District Hospital, Taiping and the Government of Malaysia claiming contribution and indemnity. The third parties denied that the appellant was entitled to contribution or be indemnified by them and also pleaded that the appellant's action against the third parties was statute-barred by reason of s 2(a) of the Public Authorities Protection Act 1948. When the case came up for hearing, the learned trial judge acceded to the request of counsel for the third parties that the defence of limitation raised by them against the appellant be tried as a preliminary point of law. After hearing submissions, the learned judge ruled that the defence of limitation succeeded and dismissed the appellant's claim against the third parties. The appellant appealed.

[22] The Supreme Court allowed the appeal and held:

(a) s 10(1)(c) of the Civil Law Act 1956 gives a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage. Order 16 of the Rules of the High Court 1980 deals with third party proceedings but a proceeding under the order should not be treated in the same way as an action between a plaintiff and defendant;

(b) third party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has a right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date the defendant is liable; and

(c) therefore, in the case of the third parties, s 2 of the Public Authorities Protection Act 1948 should not assist them although the third party notices were issued on 4 January 1985 when the period of 36 months had elapsed by then from the date of the accident (14 January 1981) or the date of death of the motorcyclist (16 July 1981).

[23] Thus, based on *Mat Abu*'s case, it is quite clear that, time (*for purposes of commencement of the cause of action claim for indemnity or contribution*) only starts to run when the defendant is found liable. As such, the defendant's right to sue a third party based on a claim for indemnity or contribution cannot be said to have been delayed, Hence, on that premise and analysis, we do not agree with the High Court which opined that there was inordinate delay.

[24] Of course, we accept and completely appreciate the reality that Irwan's third party action will cause delay to the trial which is still on-going, but that is unavoidable particularly in a case of this magnitude involving several complex

transactions, voluminous documents, Board of Directors' papers, minutes etc, which must all be thoroughly examined and the facts properly marshalled before filing third party action. Looking at Irwan's rather comprehensive statement of claim against the third parties, it cannot be said that the claim for contribution is frivolous or is an abuse of process. There is a plethora of allegations made against Azmi and against the Co-Directors, Kamal and Norazman.

[25] There was a suggestion made before us that the present appeals are on the same footing as the case of *Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)* [2012] 9 MLJ 464; [2012] 2 MLRH 466 (HC). In our view, the suggestion is misplaced. In that case, the executive director who was sued by the company was unsuccessful in his attempt to bring in the non-executive directors as third parties. That distinction is not applicable on the facts of the present case.

[26] Here, the third parties parties have in fact filed their defence to the third party action and must, in our view, answer for their respective roles and actions (*or inaction*) as CFO, and as directors respectively. We do not think that it is entirely correct to say that it is for 1MDB to choose who they wish to sue. That is only partly right. The correct legal position is that whilst it is the company's prerogative to choose who they wished to sue, it is nevertheless open to a defendant to bring as third parties, all parties who in the defendant's view share or bear responsibility for the actions (inaction) and who may be liable/answerable for the claim in the main suit.

[27] In the present case, the third parties may ultimately have to contribute to the claim made by 1MDB against Irwan. Hence, as far as the claim against Kamal and Norazman is concerned, whilst they owe duties to 1MDB, this does not mean that Irwan cannot seek contribution against them via third party action. In any event, it is relevant to refer to the Court of Appeal's decision in *Datin Paduka Phang Oi Choo @ Phang Ai Tu v Tan Sri Datuk G Gnanalingam and other appeals* [2017] 5 MLJ 800 (CA). In that case, the Port Kelang Authority ('PKA') brought an action against the appellant (OC Phang) premised on a series of allegations of breach of fiduciary duties in the appellant's capacity as general manager and Board member of PKA pertaining to the Port Kelang Free Zone Project ('the PKFZ project'). OC Phang contended that the said breaches were made as a result of the collective deliberation, discussion and/or decision-making process undertaken by the Board members of PKA, all of which were approved by the relevant ministries of the Government of Malaysia.

[28] Subsequently, OC Phang filed third party proceedings against the third

parties seeking contribution in the event she was found liable for any loss and damage suffered by PKA. The third parties in turn filed applications to strike out OC Phang's statement of claim pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012. The application was allowed and the High Court held, inter alia, that: (a) OC Phang's third party claim ought to be related to the PKA's pleaded claim; (b) OC Phang's liability to PKA, if proven, was of a personal nature; and (c) a claim for contribution could not stand against the third parties as no duty was found between the parties.

[29] OC Phang appealed to the Court of Appeal. The Court of Appeal allowed her appeal and held (*relevantly*) that the issues in the present case could only be determined by way of an oral or *viva voce* evidence at trial of the matter because: (a) it was insufficient to consider the third parties' extent of involvement and/or participation in the decision making process solely on the board meeting minutes produced before the High Court; (b) the distinction between the executorial or non-executorial roles of the appellant and the third parties could only be drawn at the close of the trial and not summarily by way of affidavit evidence.

[30] It is also of relevance to note that the Court of Appeal held that the High Court erred in holding that OC Phang's third party claim must be related to and/or have a nexus to the PKA's pleaded claim. The Court of Appeal opined that the High Court erred in holding that OC Phang's liability to PKA, if proven, was of a personal nature. This was because the Ministry of Finance and Ministry of Transport represented by the third parties were the ultimate approving authorities of PKA. Further, the Court of Appeal held that the High Court erred in making the determination that a claim for contribution by the appellant could not stand against the third parties as no duty was found to exist between the parties. According to the Court of Appeal, *a claim for contribution did not require there to be a relationship or duty to exist*. Thus, according to the Court of Appeal, OC Phang was only required to show that the third parties were joint tortfeasors and had participated in the procurement of a tort causing loss and damage to PKA.

[31] The Court of Appeal concluded that the issue of whether or not the third parties had actively participated in the Board meetings of PKA was not an issue which could be summarily determined in order to make finding whether or not the third parties were joint tortfeasors and that the true extent of the third parties' involvement during the Board meetings of PKA could only be properly determined through a full trial of the action, wherein their testimony be subjected to curial scrutiny. It was suggested before us that Irwan's allegations of fraud (vis a vis Azmi) are deficient or inadequate. In our view, any (alleged) deficiency on pleadings of 'fraud' made against Azmi, must be addressed at the trial at the appropriate juncture. If there are no particulars of

fraud vis a vis, Azmi, then it is up to him to seek the appropriate outcome when the case comes up.

[32] But, fraud is just one of the allegations against Azmi. There are so many other allegations against Azmi. And all of these have to be answered in the claim via third party action. As for particulars of the claim against Kamal and Norazman, we think that the statement of claim is quite comprehensive and they are not in any way prejudiced as they have filed a defence to the third party action.

[33] In any event, the third party action against Kamal and Norazman are based, inter alia, on the claim by 1MDB against Irwan. Essentially, Irwan, Norazman and Kamal are now in the same situation except that the latter two persons have to answer to Irwan's third party claim instead of answering to a claim by 1MDB.

OUTCOME/THE ORDERS

[34] In the upshot, on our examination of the factual matrix and on applying the legal principles from the cases alluded to earlier, we are persuaded that the main criticisms directed at the judgment of the learned judicial commissioner as advanced by counsel for Irwan, are well founded.

[35] Hence, for the reasons articulated in the preceding paragraphs of this judgment, we are of the view that that the judicial commissioner had misdirected himself in striking out the third party action against Azmi (*former CFO of 1MDB*), Norazman and Kamal (former directors of 1MDB). Thus, Appeal 1572 and Appeal 1573 are allowed and the decision of the High Court dated 6 September 2024 in respect of High Court encls 236 and 241 is accordingly set aside.

[36] Consequently, the application by Kamal and Norazman (Appeal 1572) per High Court encl 236 is dismissed. And likewise, the application by Azmi (Appeal 1573) per High Court encl 241 is also dismissed. We allow costs (here and below) in the sum of RM30,000 (subject to allocatur) in favour of Irwan (the appellant) for each appeal.

[37] We make a further consequential order that the parties in both appeals are at liberty to amend their pleadings in the third party action as per the following timeline — Irwan to file the amended statement of claim by: 27 November 2024; Azmi, Norazman and Kamal to file their amended defences by: 18 December 2024; and Irwan to file reply to amended defence by 2 January 2025. As for the trial. The parties are at liberty to apply to re-call any of the witnesses who have testified in the main trial. Parties are at liberty to

apply to the trial judge for all such directions as may be necessary for the conduct of the trial of the third party action.

Appeals allowed; and High Court's decision set aside.

Reported by Ashok Kumar